American Bar Association Journal

December 1950

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In This Issue

Dean Pound Warns of Trend Away from Bill of Rights

Dean Pound writes that he sees an ominous portent in our law. The growth of the notion of absolute liability, replacing the common law theory of liability based on fault, the trend toward contractual *dirigism* and away from freedom of contract, says Dean Pound, are examples of a changing attitude that coincides with the rising clamor for a service state and the adoption of "Declarations of Rights" that are mere preachments and declarations of good intentions, legally binding upon nobody. This change of attitude, he says, is undermining our constitutional polity, characterized by our bills of rights, which set forth rights that are legally enforceable. There must be a balance, Dean Pound declares, between the desire for freedom and the desire for equality which this new trend stresses. (Page 977.)

John Alan Appleman Discusses Estate Planning

Estate planning is no longer a simple task that the family attorney can handle in a few hours, Mr. Appleman declares. It has become a complex matter, requiring the work of an expert in the field and the consultation of life underwriters, accountants, tax experts, banking and trust officials, as well as the family attorney. In this article, he sets forth the considerations involved in estate analysis, and urges the general practitioner to consult expert estate analysts. (Page 982.)

Herbert W. Clark Proposes a National Bar Examination

There are forty-nine jurisdictions in the United States for the admission of members of the Bar. Each of the forty-nine has some form of examination to determine who shall be allowed to practice law. These examinations vary greatly from state to state, and in many states are drawn up by men that have had no training and little experience in composing examinations. Herbert W. Clark, of California, examines this whole problem in detail in his article, "Bar Examinations: Should They Be Nationally Administered?" (Page 986.)

Justice Clark Urges Reform of Judicial Administration

In an address prepared for the Judiciary Dinner of the United States on September 19, Justice Tom C. Clark of the United States Supreme Court called attention to the many reforms needed in the administration of justice in our state courts. He named three objectives to be accomplished: unity of administration, simplicity of organization, and integrity and ability of the judges. These reforms will require legislative and constitutional enactments, he observed, and it is the responsibility of the Bench and Bar to assume the leadership in securing the improvements. (Page 991.)

Adlai E. Stevenson Calls for End of Alliance of Crime and Politics

The current investigation of organized crime by a Senate committee under the chairmanship of Senator Estes Kefauver, of Tennessee, has brought nationwide publicity to a problem of law enforcement that has plagued honest and capable public officers for many years—the alliance of politics and crime. Governor Adlai E. Stevenson, of Illinois, addressing the Criminal Law Section at the Annual Meeting in Washington last September, called upon the citizens to bring an end to this alliance. Governor Stevenson used his experience as the Chief Magistrate of the State of Illinois to illustrate the dangers that public indifference and public cynicism have allowed to multiply throughout the country. (Page 994.)

Dean Griswold Outlines Recent Tax Trends

Dean Erwin N. Griswold of the Harvard Law School writes of the impact that the war in Korea will necessarily make upon the nation's economy and the citizen's pocketbook. He says that taxation should not be regarded as a necessary evil, however, for it is in truth a benefit, as Holmes remarked "what one pays for civilization". This article is taken from an address delivered before the Section of Taxation at the Annual Meeting in Washington. (Page 999.)

Dean Stimson Proposes a Statute To Simplify the Conflict of Laws

One of the problems that furrows the foreheads of lawyers and judges is whether, when there is a conflict of laws, such matters as damages, burden of proof, presumptions and the like are matters of substance or of procedure. Dean Edward S. Stimson of the University of Idaho College of Law has drafted a federal statute to simplify the whole problem and establish uniform rules on the question throughout the United States. His proposed legislation is printed here along with an article summarizing the problem and explaining how his statute would solve it. (Page 1003.)

Use of Injunction in Labor Disputes Considered in 1950 Ross Essay

The 1950 Ross Essay Contest, was won by Norman C. Melvin, Jr., of Baltimore, Maryland. Mr. Melvin's essay, on the subject chosen by the Board of Governors of the Association, "The Use of Injunctions in Labor Disputes", is a summary of the history of the subject from the latter half of the nineteenth century, when the injunction was first used to halt industrial strikes, down to the Taft-Hartley Act and the coal strikes of last winter. (Page 1007.)

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TAPPAN GREGORY

Sworn to and subscribed before me this 4th day of October, 1950.

(Seal) ELEANOR MUELLER

(My commission expires November 21, 1951)
Notary Public in the State of Illinois.
Residing in Cook County.

Law in the Service State:

Freedom *versus* Equality

by Roscoe Pound · Dean Emeritus of Harvard Law School

■ Addressing a general session of the Section of Insurance Law during the Washington meeting in September, Dean Roscoe Pound spoke of trends in our law that seem to him to be leading us to a service state. The growth of the notion of absolute liability in tort law, the rise of the prediction theory of contract law, the decline of the feeling that a bankrupt has any moral obligation to pay his debts, seem to him to be symptoms of a change in our governmental polity, he said. It is not the idea that the Government should perform public services that he quarrels with, Dean Pound declared, but the idea that all public services must and can only be performed by the Government, an idea which looks forward to an omnicompetent government composed of supermen, which would be but a short step from the absolute state. This article is taken from that address.

■ A Negro who used to do some work for my father had come from the West Indies and was never weary of talking about them. "They have there", he said one day, "a drink they calls planter's punch. And you know, Judge, those planter's punches they creeps up on you surruptitious and clandestyne." The service state, the state which, instead of preserving peace and order and employing itself with maintaining the general security, takes the whole domain of human welfare, except perhaps the welfare of our souls in the hereafter, for its province and would abate all economic and social ills and alleviate all individual distress through its administrative activities has been creeping up on us in the present century after the manner of "those planter's punches". It was well known earlier in Continental Europe. But although some writers in England were calling attention to its increasing headway and suggesting its implications at the end of the last century, it seemed so at outs with ingrained modes of Anglo-American thought that few tried to put the pieces together to see what is indicated as to the direction in which we have been moving. In the meantime, since World War I it has made exceedingly rapid progress and has already covered a very wide field of restriction of individual spontaneous activity and official promotion of wide ideal welfare programs on every side.

I say service state rather than welfare state. The term welfare state seems to me a boast. Governments have always held that they were set up to promote and conserve public welfare. That is implicit in the synonym "commonwealth"—the common weal or general welfare personified in the state. So far men have agreed. But when it comes to the question how the common weal or general welfare is to be achieved they have differed and do differ widely. Some think the general welfare is best promoted by a government that maintains the general security and administers justice, for the rest leaving men free to do things for themselves in their own way so far as they do not commit aggressions upon others or subject others to unreasonable risk of injury, and act in good faith in their intercourse with others. On the other hand, there have always been those who have believed in a benevolent government which helps men instead of leaving them free from hindrances to helping themselves and secure from wrong while doing so; who have believed in a paternal ruler and all-wise officials knowing what men need better than they themselves know and doing things for subjects or citizens to the fullest extent.

Service State in Itself Is Not Wrong

Understand me, I am not preaching against a service state in itself. The society of today demands services beyond those the state which only maintained order and repaired injuries could perform. In a complex industrial society it becomes more difficult to do by private initiative many things that the public

wishes done and wishes done quickly. Administrative agencies of promoting the general welfare have come to be a necessity and have come to stay. It would be futile to quarrel with the idea of a service state kept in balance with the idea of individual, spontaneous initiative, characteristic of the American. What one must question is not state performance of many public services which it can perform without upsetting our legal, political, economic and social order, but the idea that all public services must and can only be performed by the government—that politically organized society and that alone is to be looked to for everything, and that there is no limit to the services to humanity which it can perform. What gives me pause is carrying to the extreme the idea of regimented co-operation for the general welfare; the exaltation of politically organized society to the position of an absolute ruler. This presupposes supermen administrators or an all-wise majority or plurality, omnicompetent and equal to taking over the whole domain of the general welfare and to determining in detail what it calls for in every situation. The service state in the English-speaking world began by performing a few major additional services beyond maintaining order and administering justice. As it has added more and more it has come to be jealous of public service performed by anyone else.

It behooves us to be thinking about the effect of the rise of the service state upon every side of our social and political and legal order. Books have been written about its effects upon morals, economics and the general welfare it seeks to promote. I shall speak only of its effects upon our constitutional polity, of its effects upon the professions, and of its effects upon fundamentals of legal theory.

Liberty—free, individual self-assertion, individual initiative and self-help—is looked on with suspicion, if not with aversion, by the service state, and its advocates seek a "new concept of liberty" as freedom from want and freedom from fear, not freedom of self-assertion or of self-determination. Self-help by the individual, competing with the service rendered by the state, seems an interference with the regime maintained by the government. Spontaneous individual initiative is frowned on as infringing on the domain of state action. The service state moves toward an omnicompetent state and conducts propaganda activities at public expense directed to the increase of its powers. If the step to it is gradual, the step from it to an absolute state is easy and may be made quickly.

Service State Is Changing Our Bill of Rights

What is more significant is its effect on our American constitutional polity. Bills of rights are a characteristic feature of American constitutions. Beginning with the Virginia Bill of Rights of 1776, enacted immediately after the Declaration of Independence, they have been made a part of all our constitutions, state and federal. Our American bills of rights are prohibitions of governmental action infringing guaranteed rights, that is, guaranteed reasonable expectations involved in life in civilized society. They are laws, part of the Constitution as the supreme law of the land, enforceable in legal proceedings in the courts at suit of those whose rights are infringed. They are generically distinct from the declarations of rights on the model of the French Declaration of the Rights of Man which are to be found in constitutions generally outside the English-speaking world. Those are mere preachments, declarations of good intentions or exhortations to governmental authority, legally binding on nobody and unenforceable by anyone whose declared rights are infringed. But the service state is beginning to affect our conception of a bill of rights in America. In a recent proposal for a declaration of rights for a world government we get the Continental note in the very title, but also the note of the service state which is disinclined toward law. There is a declaration of a right of everyone to claim for himself "release from the bondage of poverty". It is not that he is to be free to free himself from that bondage, but that the state is to free him without his active help in the process. Also he is declared to have a right to claim reward and security according to his needs. But his claim to needs is likely to have few limits and is sure to conflict with the claims of others to like needs. Such declarations are not only mere preachments, not enforceable nor intended to be enforced in law; they are invitations to plundering.

It is characteristic of the service state to make lavish promises of satisfying desires which it calls rights. If a constitution promises to every individual "just terms of leisure", those who draft it do not ask themselves whether such provision is a law, a part of the supreme law of the land, or a preachment of policy which no court can enforce and no legislative body can be made to regard. Such preachings enfeeble a whole constitutional structure. As they cannot be enforced, they lend themselves to a doctrine that constitutional provisions are not legally enforceable and may be disregarded at any time in the interest of political policy of the moment. They weaken the constitutional polity we have built up. Setting forth such things in a constitutional declaration of guaranteed rights makes a farce of constitutions. How can a world government release the whole world "from the bondage of poverty"? What organ of government can be made to bring about that enough is produced and is continuously produced to insure plenty for everyone everywhere? How can a court compel legislative or executive or individual or organizations of individuals to bring this about or how can executive or legislative compel either or anyone else to do it? A power to act toward a general equality of satisfaction of wants and a policy of developing such an equality are something very different from a provision that a world government

guarantees to bring such a policy to fruition.

I have spoken at some length of proposals for declarations of rights for a world political organization because the propositions drafted by enthusiastic promoters of a world constitution are followed sometimes in recent proposals for constitution writing in the development of the service state in America. A state which guarantees to relieve its people of want and fear is endangering political democracy. This does not mean, however, that our nineteenth-century bills of rights cannot be supplemented to meet conditions of the urban industrial society of today. The two new articles in the bill of rights of the New Jersey Constitution of 1947, directed to questions of discrimination on grounds of race, color or creed, and to rights of organization and collective bargaining, are models of constitutional provisions part of the effective law of the land, enforceable and meant to be enforced, as compared with preachments and promises and wishful declarations of ideal policy.

Fabian Bachrach

ROSCOE POUND

"The Superman" Is Selling Point of Service State

Promissory bills of rights creating expectations of the politically and legally unachievable and so weakening faith in constitutions are a step toward the totalitarian state. The strong selling point of that state is its argument that a strong man, a superman leader, can do what a government hindered by constitutional checks and balances cannot do. When a constitution declares as rights to be secured by government, expectations which the government cannot secure, it invites centralization of power in an absolute government which claims ability to secure them. The service state, taking over all functions of public service, operating through bureaus with wide powers and little practical restriction on their powers, through government positions for a large and increasing proportion of the population, and through systematic official propaganda and a system of subsidies to education, science, and research, can easily be taking strides toward an absolute government, although under forms of democracy. Indeed, the extreme advocates of the service state insist that constitutional democracy is a contradiction in terms. They argue that a democracy must be an unrestricted rule of a majority. The majority must be as absolute a ruler in all things as was the French King of the old regime in France or the Czar in the old regime in Russia. As the seventeenth century argued that a monarchy must in the nature of things be an absolute not a constitutional monarchy, on the same logical grounds it is asserted that a democracy must be an absolute not a constitutional democracy.

General welfare service by the state, becoming service for strong aggressive groups or for politically powerful localities at the expense of the public at large, has been the ladder by which absolute rulers have climbed to power and the platform on which they have been able to stay in power. Louis XIV held down France by holding down Paris by distribution of bread at the expense of the provinces. The Spanish monarchy long held itself in power by using the wealth of the New World for service to its subjects at home. Napoleon III used state workshops. Totalitarian Italy used the theory of the service rendered by the corporative state. Totalitarian Russia promises proletariat rule at the expense of the rest of the community. Indeed, in antiquity the Roman emperor held down Italy by extortion of wheat from Egypt.

Another serious feature of the rise of the service state is its threat to the

professions. By a profession we mean a group of men pursuing a common calling as a learned art and as a public service—none the less a public service because it may incidentally be a means of livelihood. Gaining a livelihood is not a professional consideration. The spirit of a profession, the spirit of public service constantly curbs the urges of that incident. An organized profession does not seek to advance the money-making feature of professional activity. It seeks rather to make as effective as possible its primary character of a public service. An engineer may patent his inventions. A manufacturer may get legal protection for his trade secret. What a member of a profession invents or discovers as to the art of his profession is not his property. It is at the service of the public. A tradition of duty of the physician to the patient, to the medical profession and to the public, a tradition of the duty of the lawyer to the client, to the profession, to the court and to the public, authoritatively declared in codes of professional ethics, taught by precept and example, and made effective by an organized profession, makes for effective service to the public such as could not be had from individual practitioners not bred to the tradition and motivated as in a trade primarily if not solely by quest of pecuniary gain. Nor can this professional tradition be replaced with benefit to the public by bureaus of physicians or bureaus of lawyers, holding public employment, owing primary allegiance to political parties and depending for advancement on the favor of political leaders. When every form of public service becomes a state function the difference between a public service performed by a profession and a public function performed by a bureau will become crucial.

Again, if the professional idea is lost the great body of those holding minor positions in performance of public functions come to be thought of and to think of themselves as employees. Already municipal employees are becoming organized in trade unions. In Los Angeles the probation officers, whom we had been thinking of as members of a rising profession of social workers, are members of a probation officers' union, affiliated with a national labor organization. Teachers in the public schools have been unionized in more places than one and members of university faculties are now active in a teacher's union in some of our old historic institutions. Thus, as things are coming to be in an era of bigness, large-scale organization of all activities, and strenuous acquisitive self-assertion, the professional idea must contend with the rise to power of organizers of an expanding class of employees. Unless we are vigilant it may well be that this prevailing of the trade idea will make straight the path toward absorption of the professions in the service state. The course of that path is not hard to chart. We can see three stages as threatened. First, unionizing of all callings which may be taken to involve employment, at least so far as some in the calling are not capable of classification as employers; second, by government subsidies getting control of professional education and thus subordinating the professions to bureaucratic management; third, seeking to bring cheap and equal professional assistance to everyone's back door by government's taking over of the callings pursuing learned arts. Such a consummation may be pictured as a carrying of the idea of the service state to its furthest logical development. The service state began by performing a few major services. In time it has undertaken more and more. Now it assumes that all public service belongs to the state and is jealous of public service being performed by anyone else. The advocates of the omnicompetent state will say that in primitive and pioneer societies certain public services are rendered by anyone who seeks to try his hand on the basis of such qualifications as he deems sufficient. Later, as society advances, such services are rendered by well qualified practitioners organized in professions, the qualifications, as these professions develop, being prescribed and ascertained by governmental authority. Ultimately, it will be said, as political organization of society reaches maturity, all public services of every sort are to be exclusive governmental functions to be exercised by government bureaus.

Idea of Profession Is Incompatible with Its Exercise by Government

Indeed, the idea of a profession is incompatible with performance of its function, exercise of its learned art by or under the supervision of a government bureau. A profession presupposes individuals free to pursue a learned art so as to make for the highest development of human powers. The individual servant of a government exercising under its supervision a calling managed by a government bureau can be no substitute for the scientist, the philosopher, the teacher, each freely applying his chosen field of learning and exercising his inventive faculties and trained imagination in his own way, not as a subordinate in an administrative hierarchy, not as a hired seeker for what he is told to find by his superiors, but as a free seeker for the truth for its own sake impelled by the spirit of public service inculcated in his profession.

Now let us turn to some of the effects of the rise of the service state upon the law. One conspicuous effect may be seen in the theory of liability in the law of torts. In the last century the general security was most commonly taken to be the paramount social interest. In the English-speaking world, until the present generation, security has meant security from aggression, or fault, or wrongdoing of others. Today "security" is being used to mean much more. It is made to include security against one's own fault, improvidence, ill luck, and even defects of character. Thus there is an extension of liability beyond the basis in the general security as understood in the past. Indeed, there is more than an ex-

tension. There is emergence of a new idea and building a new presupposition upon it. A developing humanitarian idea seems to think of repairing, at someone's expense, all loss to and frustration of everyone, no matter how caused. Carrying out the promises of the service state, it seems to presuppose that in civilized society everyone must be able to expect a full economic and social life. To fulfill this expectation, to guarantee the expected full economic and social life, the law seems more and more to be called on to find for every victim of loss or sufferer from frustration, for everyone who for any reason cannot keep the pace of attaining his ambitions, reckoned as his expectations, what I have called the involuntary Good Samaritan to pull him out of the ditch, bind up his wounds, set him on his way and pay his hotel bill.

"Liability Without Fault" Is Gaining Ground

In the common law we started with liability for intentional aggression. We added liability for casting an unreasonable risk of injury upon others by want of due care under the circumstances of action. Thus it seemed settled a generation ago that the basis of liability was fault. But an additional ground of liability, much debated in the last quarter of the nineteenth and first decades of the present century, became established; a liability where, without fault, one maintained something or carried on some activity, harmless in their ordinary use or course, but in their nature likely to get out of hand or overpass the boundary of their use and do damage, and the thing maintained or activity carried on got out of hand or was not restrained and caused loss. Here the ground of liability is power of control of the agency causing the loss. This is the true basis also of the common-law liability under the doctrine *respondeat superior*. All three of these grounds of liability at common law respond to the social interest in the general security. But now we have newly asserted grounds of liability responding to a claim of the individual who suffers loss to have a full economic and social life provided for him. If the state, in the pressure of broad welfare plans upon public revenues, cannot repair the loss directly and immediately it is to find someone who can.

Accordingly it is proposed that a manufacturer should incur an absolute liability, without regard to negligence, if an article he has placed upon the market expecting it ultimately to reach a purchaser who will use it proves to have a defect and someone is injured. The reason is said to be that those who suffer injury from defective products are unprepared to meet its consequences; the cost of an injury and the loss of time and health may be an overwhelming misfortune to the person injured. Hence someone must be found to pay for it. A specious reason for imposing such liabilities is sometimes advanced that a utility or a manufacturer or producer upon whom liability is cast may pass the loss on to the public at large in charges for services or in the price charged for products. But in the bureau organization of the service state the proposition as to passing damages for losses incurred by no one's fault on to the public by way of employer or public utility or industrial enterprise is fallacious. One bureau or commission fixes rates for service. Another fixes or may be fixing prices. Another has control of wages and hours. A jury or some administrative agency fixes responsibility and assesses the damages or the amount of compensation. Each of these agencies operates independently. Those that control rates and prices are zealous to keep the cost to the public as low as may be. Those that control the imposition of liability are apt to be zealous to afford the maximum of relief to the injured or their dependents. With continual pressure upon industry and enterprise to relieve the tax-paying public of the heavy burdens which our recent humanitarian programs involve, the practical result is likely to be that the burden is shifted arbitrarily to the most convenient victim.

Absolute Liability Resembles *Deus Ex Machina*

Not only is absolute liability of the manufacturer proposed by an able judge and apparently accepted by the court in another state, but a teacher in one of our great American law schools argues for abolition of the doctrine of the independent contractor in our law of agency. Our law is that *respondeat superior* applies where there is right and power of control over the person immediately acting. Where the actor is an independent contractor there is no such control. But frequently the independent contractor has no means sufficient to be reached on an execution. Hence, we are told, losses and injuries go unrepaired, which must not be. In the same spirit another judge intimates that the requirement of causation as an element in liability should be eliminated. Suppose *X* determines to commit suicide and stands at the corner waiting for a bus or heavy truck as the chosen agent of self-destruction. When one comes along he throws himself beneath its wheels and is killed. If causation is eliminated and fault too, should not the transportation or trucking company, which can pay a judgment, repair the loss to the widow and children? Thus we achieve high humanitarian purposes by the easy method of using the involuntary Good Samaritan as the Greek playwright used the god from the machine. Looking at realities, however, it is the method of Robin Hood or of Lord Bramwell's pickpocket who went to the charity sermon and was so moved by the preacher's eloquence that he picked the pockets of everyone in reach and put the contents in the plate.

What seems to be developing as a jural postulate is: In civilized society men are entitled to assume that they will be secured by the state against all loss or injury, even though

(Continued on page 1050)

Estate Analysis:

The Role of the Family Attorney

by John Alan Appleman • of the Illinois Bar (Chicago and Urbana)

■ Mr. Appleman believes that the subject of estate planning has now become a task for experts. When a client walks into his attorney's office and announces that he wishes to make his will, a conscientious lawyer can no longer say, "Fine. What do you want in your will?" Mr. Appleman declares that if the client knew that he would not need a lawyer. His article is an account of the things that the expert estate planner and the family attorney must consider along with other experts in setting up an estate plan.

■ The field of will review and estate analysis has come into increased prominence in the last few years. The work of many different types of individuals bears directly upon the subject. Thus, life underwriters, accountants, taxation experts, banking and trust officials, and attorneys have frequently been consulted regarding the necessity of a complete estate analysis of some client. It must be realized, of course, that great study and preparation is required in order for one to advise the client properly as to his needs. Actually, the close cooperation of all of the types of individuals named is frequently required in the preparation of any plan.

The simplest definition of an estate analysis is that it is the making and analyzing of an inventory of a given individual, his material and financial accomplishments, his powers, talents, and responsibilities, his aims and directives in life, and his spiritual desires. The assembling of that material constitutes what we call a "plan foundation", "data sheet", or "inventory". The second step involves the analysis of this material and the shaping of this vast amount of data into a theory of procedure which will solve the problems presented. The third step is the drafting of the instruments which places the estate plan into effective operation.

Accordingly, the estate reviewer, in making an analysis, must be a person who knows, first of all, more about the client than the client actually realizes about himself. The really busy man who is financially successful, is usually considerably above the average type of client. He is the type of individual who works hard and plays hard, and who observes no limitations upon his working hours. He has usually never taken time to undergo that rigorous type of examination which is required for an estate analysis. Even his intimate associates, such as his life underwriter, his personal attorney or his doctor, do not have the information that is required to conduct an estate analysis.

Second, the estate analyst must be thoroughly familiar with the laws that pertain to income, gift, estate and inheritance taxes; the laws of trusts, wills and future interests; the form and legal interpretation of life insurance contracts and settlement agreements, and have had unlimited experience in the handling and settling of estates.

Third, the analyst must be a skilled draftsman, capable of explaining in clear and simple legal language the exact substance of the plan.

Fourth, and perhaps most important, the estate analyst must possess an unlimited amount of common sense, an understanding of psychology, and a gift of salesmanship in order to explain properly to the client the necessity for the steps taken.

Fifth, he must have a rigid code of ethics and idealism which are placed on a higher plane than unjustified desires of his client, and the importunities of members of his family and third persons.

Drawing a Will Is No Longer an Easy Task

Let us take an estate analysis from its inception. The client may come into an attorney's office and say "I want to draw a will". The day is past when a conscientious lawyer will say, "Fine. What do you want in your will?" If the client knew that, he would not have had to come

to an attorney in the first place. Any little handbook which he could buy at some corner drugstore would tell him standard forms of wills if he wants to use stock or boiler plate phraseology. Even the little man, whose estate is limited, must have his problems solved from the same point of approach. As a rule, however, his situation is not so complex as that of the business or professional man who has substantial holdings in life insurance, corporate securities, and other assets.

In order to prepare a proper estate analysis, complete information must be secured with the general assistance of the client, accountant, banker, family attorney, family physician, and life underwriter, and many other sources of information may have to be contacted. Most of the information required can be secured from a personal examination of the client's life insurance policies, deeds, personal income tax returns and the balance sheet and tax returns of any business in which the client is interested, without unduly burdening him as to duplicitous details. But whatever source may be employed prior to completion of the analysis, complete data are required. Such data include complete personal information concerning the client, his wife and every member of the family, including information concerning his own and his wife's parents. This is vital for the preparation of any will or trust instrument and gives the estate analyst all pertinent family data.

Information should also be secured concerning the client's present and prior employments, the nature of his business, his business associates, and his plans for continuance or disposition of the business after death, or upon retirement. This information is not only vital to the estate plan itself, but discloses many weaknesses with reference to partnership agreements, key-man insurance and voting trusts. The income from all sources is also required, including copies of income tax returns for the last five years.

Complete Analysis Should Be Made of All Client's Assets

A complete analysis of the client's assets should be made, including the nature of each different type of property. One may even find in this connection that the client has homes in different states. This is most important in determining the question of domicile. For example, a client having his business and the situs of many corporate securities in New York, may have a manufacturing plant in New Jersey, commute from Connecticut, and have a winter home in Florida. Certainly the estate analyst must take all these factors into consideration and be familiar with the testamentary and tax laws of each of these states.

As one of these assets, insurance, not only life insurance but health and accident, property and liability coverages, must be disclosed. The life insurance policies should be turned over to the estate analyst for personal inspection. Only in that way can detailed information be secured concerning the policies and settlement agreements which are then contained in the policies, and wise provision made for any changes required or thereafter needed. The insurance analysis may show a woeful lack of coverage as to specific properties and as to various liability coverages, which should be added.

A complete disclosure of the client's liabilities is required, whether direct or contingent, in order that provision may be made for the discharge of such obligations. The client's ordinary expenditures for living purposes, his activities, membership in social organizations, and his relationship to gifts and trusts, whether created by him, or for his benefit or that of members of his family, must be revealed. A statement as to income, assets, liabilities and expectancies of his wife, his children, and both sets of parents, must be made.

With reference to personal information, as a part of any proper analysis, a study is made of the client's health, both in the past and at the present time, his hobbies, his practices with regard to vacations, and his retirement plans. It has been wisely stated that retirement is not an escape—one must retire to something and not from something. Only by ascertaining the intentions and desires of the client can provision be made for these contingencies. His desires as to administration, guardianships and even funeral plans are then sought. And lastly, one prods deeply into the client's mind to ascertain his relationship with his family and his personal desires with reference to each member of his family, relatives, employees, charities, or any other object of his bounty.

Estate Analysis Is Tremendous Task

Of course it must be remembered that there is no substitute for a personal examination by the analyst of the documents, policies and written instruments which must be considered, for without them no one can possibly establish a satisfactory analysis. It is from this type of basic data that most conclusions must be drawn. However, there is still a tremendous task for the client even with the assistance of his family attorney, banker, life underwriter, accountant, and others. In assembling the necessary material it may require him to spend a great deal of personal time, but it is time well spent. A businessman may spend a week taking an inventory of his business once a year. He can certainly afford to take a week or more to take an inventory of himself. Not only may the result accomplish the saving of tens of thousands of dollars in taxes, but it requires him to re-examine himself in his relationship with his business associates and his family, to redetermine his aims in life, and to see the direction in which he has thus far travelled.

The biggest hindrances in the field of estate analysis are two types of persons—the quack and the charlatan. The quack may be, but is not necessarily, a lawyer. He has learned a little of the stock language employed which he uses very glibly, and pretends to much greater knowledge than he possesses. The family attor-

ney, trust officer, or insurance representative should shun such a man as he would a forest fire. The charlatan is often one who styles himself a "tax expert". A real tax expert is indispensable to the success of an estate plan, and an estate analyst must have considerable knowledge of this type. The pseudo "tax expert" is one, however, who looks to the loopholes which exist in present laws, and shapes an entire plan toward effecting some tax savings through the use of such legal loopholes. In doing so, he subordinates the plan itself to the tax phases, which is improper; he forgets that such loopholes, moreover, usually will be closed by judicial construction or by new legislation prior to his client's death; and he plunges his client, or possibly his survivors, into long and expensive litigation, with an all too frequently disastrous result. Often the charlatan can be recognized by his charging upon a percentage basis of what he claims to have saved his client in taxes.

Family Attorney Should Recommend Qualified Lawyer

To avoid the quack, the charlatan, the untrained or unskilled practitioner, it is necessary for the family attorney often to make a specific recommendation to his client as to persons possessing the skills required. Certainly this is proper and ethical, and indeed it is the duty of the family attorney so to advise his client. If a difficult and dangerous brain operation is required, a layman would scarcely expect to find a skilled neural surgeon in a farming community. He would perhaps find it necessary to go to a metropolitan center—perhaps to a different state. His personal physician, if conscientious, will recommend an outstanding doctor. The family attorney, as the personal counselor of his client, must act with equal honesty and capability in making his recommendation, disregarding personal self-interest. He must, therefore, acquaint himself with the names and locations of men seasoned in estate analysis, who have handled other problems of equal difficulty and who are regarded by other experts as qualified in the fields of life insurance and estate analysis.

As a matter of fact, the idea of using specialists as associate counsel in the field of law should not be viewed with alarm. The skilled office lawyer, disliking trial work and inexperienced therein, has long since found it advisable to call in a seasoned trial lawyer to handle a personal injury case. It is more lucrative, relieves the referring counsel from the anxiety of personally conducting unfamiliar matters, and renders better service to his client. Nor would the office lawyer dream of defending a criminal case. He prefers to have his client represented by a veteran defense counsel who can keep his client out of jail to develop new business and to pay other fees upon civil matters.

Yet for some reason the average practitioner considers it an admission of inability to refer matters of estate analysis to an expert. Perhaps because it is "office business", he seems to feel that his client expects him to have all "book learning" at his fingertips. Would that same attorney expect personally to qualify a corporation before the Securities and Exchange Commission? Would he expect to take the necessary steps for a municipal bond issue without the direction and assistance of expert bonding counsel? Obviously not! But he seems to feel that he has handled several or even many estates and that he is thereby qualified as an estate analyst.

Estate analysis or estate planning, as it is more frequently called, is a vastly different thing from estate administration. One does not become an estate analyst by reading a few articles upon the subject, or by subscribing to some multivolume tax service which he does not have time to read. There comes a time in every lawyer's practice, perhaps often, when the interests of the lawyer and those of his client may conflict—perhaps in the decision whether to try or settle a case, or whether to call in associate counsel or tackle an unknown problem unaided. If a conflict does arise, to a reputable attorney there can be no doubt as to his decision. The interests of the client come first!

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Attorney Should Not Hesitate To Call in Associate Counsel

This decision assumes that the local, or family, attorney might suffer by calling in associate counsel. Actually he does not. To be practical, the drafting of a will or trust instrument in the average locality is a losing proposition. The client expects such service at a nominal charge which does no more than pay overhead. The attorney suffers the initial loss in the hope of securing a later administration of the estate—in which hope he is frequently disappointed.

Suppose, however, he arranges an appointment with an estate analyst upon an involved case and accompanies his client to the city where the expert is located. That is a desirable thing, since the client's assets and problems are familiar to the family attorney, but unknown to the associate counsel. The presence of

the family attorney can help greatly in securing the necessary data in a simple and orderly fashion. Then, under the direction of the estate analyst, the family attorney can help to gather much of the information necessary for the estate plan and be compensated adequately for his time—preferably submitting his statement to the specialist who may include it in his charges.

Thus, the original fee of twenty to fifty dollars will probably amount to several hundred. All the services, however, inure directly to the client's benefit. Now, so far as administration of the estate is concerned, it would scarcely be ethical for the family attorney to name himself in a will as lawyer for the estate, although some less scrupulous counsel do so. However, the estate analyst is interested in determining the wishes of his client as to estate administration and trust matters—even to the minister preferred by the client to conduct the funeral ceremony, such personal data generally going in a supplemental document. The estate analyst personally does not handle administrations of the estates of referred clients. But he is concerned with following the desires of his client as to the attorney who shall represent the estate. This is of particular importance when such attorney, by his close contact with the estate plan, is thoroughly familiar with the provisions of the instruments and the intent to be effected. Thus, the family attorney or his firm may be designated by the estate analyst with perfect propriety—and that attorney or law firm has a much greater chance of representing the estate than where he or it undertakes to draft the instruments personally. The client and the estate are both better served by this close cooperation, and the family attorney renders a service of value, for which he is, in turn, compensated.

The true estate analyst realizes that emphasis must fall upon the solution of the problem presented from the personal inventory and the aims and achievements of his client. These data may, and often do, disclose the inadequacies of the investment and insurance program of the client. If the client is in a partnership, often no thought whatever has been given to the question of the continuance of that business after the client's death, the question of management, the discharge of debts, or insurance which would permit the purchase of the partnership business by the surviving partners. If there is a corporation, like problems are presented. Often the financial survey will show a lopsided investment picture, which investments would be difficult and even dangerous for a surviving widow to supervise, or the existence of white elephants bearing a high tax value, but little market value. The client will, from the study, see exactly what his picture is at that time, and from that can help to project what should occur in the future.

The estate analysis also involves the making of retirement plans and the fixing of definite and realizable objectives. It involves the planning for death in order that a minimum financial loss will result therefrom and so that the client's plans for his family can be carried out, including emergency or unusual contingencies that may arise. As a total result, the client achieves a tremendous mental relaxation from completely understanding his problems and from seeing a satisfactory solution evolved.

One can see from this that there is no single test which can be applied in all cases. Everything depends upon the situation presented under the particular circumstances. If one expects or intends to treat all cases alike, and to come up with a common solution or estate analysis in each situation, or to use standard forms or so-called "boiler-plate" material then the client is not receiving a proper service.

One of the common faults of the American business- or professional man is that he sets up false goals in life. He works too hard for that intangible thing which we call "success" or "security"—and primarily for the purpose of giving his wife and children more money than is good for them. Sometimes the process of estate analysis recalls these men to their original purposes in life, and re-establishes the true value between financial and spiritual relationships. Many men, after a self-analysis, begin to relax more; they take more frequent and extended vacations; they learn to train and develop subordinates and members of their family in the conduct of their business; they pick up hobbies they had long since abandoned because of the pressure of other activities. They begin to plan for an active and satisfactory retirement, instead of the total cessation of all activity. One client sold his manufacturing business, which he had detested for twenty years, and purchased a small winter resort in Florida, where he will probably live many years longer. And almost without exception, the family of the client profits from his relaxed attitude, making him a less tense and more enjoyable person to live with.

These things are what we might call the spiritual accomplishments of estate analysis. Once the structure has been determined, there are certain tools with which the work must be done. There may be involved, as mentioned before, the setting up of new and additional corporations, partnership agreements, and the like. But upon the estate aspects alone, the more common tools are somewhat as follows: (1) Wills and testamentary trusts; (2) Living trusts; (3) Sales and gifts; (4) Deeds; (5) Life insurance and settlement agreements.

Each of these subjects could very easily fill a book. The application of them is not within the scope of this article.

It will readily be seen, from this discussion, that the roles of the estate analyst and of the family attorney are closely related. Each dips deeply into the personal life of the client. Each must use the soundest judgment in determining the needs of the client and in making plans to solve the problems presented. By close cooperation the greatest possible service is rendered, not only to the client, but to all those persons dependent upon him.

Bar Examinations:

Should They Be Nationally Administered?

by Herbert W. Clark • of the California Bar (San Francisco)

■ Mr. Clark says that all discussions of bar examinations assume that they are a necessary part of legal education but that somehow the present examinations are not what they should be in the United States. This article, an official report to the Council of the Survey of the Legal Profession, proposes a nationally administered bar examination. In it, Mr. Clark examines the present weaknesses of bar examinations and explains how a national examination would help to eliminate them.

■ The short and correct answer to the question asked in the title of this paper is—yes. Anyone who has made even a hurried survey of bar examining processes as they have been administered for many years, and as they are now administered, in most of the forty-nine admitting jurisdictions of continental United States, will probably agree that they are woefully inadequate. The most likely remedy seems to be an examination formulated, set, corrected and graded at the national level.

Since 1921, when the American Bar Association formally reaffirmed its 1892 disapproval of the diploma privilege[1], it has been quite generally conceded by lawyers and law teachers that no admitting jurisdiction can properly delegate to any private agency the function of testing or determining qualifications for admission to practice and that it is in the best interest of the law schools themselves to require that the job of testing their product should be performed by an agency outside and independent of the schools[2].

Substantially all discussions of the subject of examinations for admission to the Bar have proceeded upon the assumption that, though they are a necessary part of the educational process through which a student must pass to prepare himself to practice law, bar examinations are not what they should be in the United States. But precisely why they are not what they ought to be or how they should be improved and strengthened are matters concerning which concrete evidence has been either meager or lacking. Nevertheless, recognition of both the desirability and the necessity of improving and strengthening the processes of testing candidates for admission has been growing during the last two decades, and especially during the last fifteen years. In substantial measure this has been due to the rapid increase during the last generation of the detail and complexity presented by the whole field of the law in each of the forty-nine admitting jurisdictions.

Lawyers who were admitted to practice in 1910 or before, and who are still actively practicing, will readily recall the simplicity of the practice in such fields as railroad reorganization, public land law, taxation, trusts, wills, and even in criminal law, as compared with the complexity and detail which encumber and bedevil each of those fields today.

The differences between yesterday and today in the practice of the law need not be enlarged upon in any detail. They are plainly apparent for any reasonably intelligent person to see, not only in New York, Chicago, Philadelphia, St. Louis, San Francisco and Los Angeles, but in Idaho and Nevada as well, and, in truth, at the crossroads in every section of our vast and economically and socially complex country.

In consequence, it is now quite generally realized that the effort the competent practicing lawyer of today must put forth to advise and protect his clients is tremendous as compared with the effort the compe-

Editor's Note: This article is a preliminary report prepared for the Survey of the Legal Profession.

The Survey is securing much of its material by asking competent persons to write reports in connection with various parts and aspects of the whole study.

As reports in some fields of the Survey will require two years or more, the Survey Council has decided not to withhold all reports until the very last has been received but to release reports *seriatim* for publication in legal periodicals, law reviews, magazines and other media.

Thus the information contained in Survey reports will be given more promptly to the Bar and to the public. Such publication will also afford opportunity for criticisms, corrections and suggestions.

When this Survey has been completed, the Council plans to issue a final comprehensive report containing its findings, conclusions and recommendations.

1. Report of the Advisory and Editorial Committee on Bar Examinations and Admissions to Practice Law (henceforth abbreviated R.A. & E.), pages 51-52. As of 1948, graduates of 13 schools in 9 states were admitted without examination. R.A. & E. 52.

2. R.A. & E. pages 51-52; Training for the Public Profession of the Law, Bulletin No. 15, Carnegie Foundation for the Advancement of Teaching.

tent practicing lawyer of a generation ago had to put forth. This being so, even without much evidence, it is but a short step to the conclusion that the law student of today and tomorrow must be subjected to better testing devices than have been used in the past to ascertain whether or not he should be licensed to practice law.

Now, however, a large body of factual information about this matter is being made available as a result of work done for the Survey of the Legal Profession. Such studies as those made of *History of Admissions* by Eustace Cullinan, of the San Francisco Bar, of *Requirements for Admission to Practice Law—Statutory—Rules—Regulations* by Professor Marion Kirkwood, of the Stanford School of Law, of *Administration, Preparation and Grading of Bar Examinations* by Dean Sheldon Elliott, of the University of Southern California, of *Bar Examinations as a Testing Device* by Professor Harold Shepherd, of the Stanford School of Law, of the *Scope and Subject Content of Bar Examinations* by Professor George Neff Stevens, of Western Reserve University School of Law, of *First Year Bar Examinations* by Eustace Cullinan, and of *Character Investigation* by Will Shafroth, of the Administrative Office of the United States Courts, have been and are being made available for the information of all who care to read them. The result of these studies is that the theory, for in the main it was no more than theory, that bar examinations in this country are inadequate and the hope that they can be strengthened and made reasonably adequate as testing devices in the process of educating students to be lawyers, now find factual support. Only the practical means of improvement remains in the field of theory or speculation.

Between 1930 and 1950, approximately 280,000 applicants for admission took the bar examinations, an average of about 14,000 per year, in all the admitting jurisdictions. Of these, approximately 7,000 per year, or 50 per cent, have been successful[3].

Of the total of 280,000 who took the examinations, a yearly average of 3,354 took them in New York, 986 in the District of Columbia, 962 in Massachusetts, 942 in Illinois, and 881 in California. In the twenty-year period there were sixteen states in each of which the average number of examinees was less than fifty per year. The lowest was Idaho with an average of seven applicants per year. The next lowest was South Dakota with nine, followed by Delaware and Nevada with eleven each, and then Wyoming with twelve.

In at least twenty-five of the admitting jurisdictions, none of the examining boards had administrative assistance of any kind, either on a part-time or on a full-time basis. Thirteen of the admitting jurisdictions provided one or more full-time assistants for their examining boards[4]. The California board had six full-time employees, including two stenographers, and one part-time assistant, readers not being counted. Pennsylvania had five, of whom three were classifiable as stenographers. New York had two full-time clerks, and some part-time legal assistants who did the grading of examination papers. Louisiana had three full-time employees, of whom two were stenographic assistants. In the District of Columbia there were two full-time and one part-time assistants. Arkansas, Illinois, Indiana, Massachusetts, Minnesota, West Virginia and Wyoming each provided one full-time assistant for either administrative or clerical service to the examining board. In Tennessee the employment of assistants was authorized "as may be required".

Eight States Provide Assistants To Prepare Exams

The difficult problem of preparing examination questions is sought to be solved in almost as many different ways as there are admitting jurisdictions, but a fairly uniform pattern has existed in a few states. In eight admitting jurisdictions, assistants are provided for, to prepare questions. In California the Secretary of the Committee of Bar Examiners arranges for the drafting of questions by law teachers outside of California. A similar arrangement exists in Connecticut. In Colorado the employment of not more than nine assistants is authorized to aid in drafting questions and in grading answers. Idaho has an assisting committee which, with the Secretary of the State Bar, helps the Commissioners of the State Bar to prepare questions. Kentucky provides two assistants to aid in preparing questions and in grading answers.

The Clerk of the Supreme Court of Nebraska helps in that state. New York has six legal assistants to help in drafting the questions and in grading the answers to long-form essay questions, and from two to four statistical assistants to grade the answers to yes-no questions. Pennsylvania has a supervising examiner and four examiners to prepare questions and grade answers, and assistance is also given by the office of the Secretary-Treasurer of the State Board of Bar Examiners.

The most elaborate, and probably the most efficient system of reading and grading papers appears to be in California, where the number of readers varies in accordance with the number of questions asked at an examination. For example, last spring twenty-nine questions were asked at the California bar examination, and twenty-nine readers and graders were employed. In addition, three reappraisers are employed. Illinois and Iowa provide a varying number of readers as the number of examinees may require. Each member of the examining board in Massachusetts has an assistant to aid in the grading.

The over-all cost of administering the examining process is approximately $440,000 annually for all the admitting jurisdictions. In California it is close to $90,000; in New York, Pennsylvania and Michigan it ranges from $60,000 down to $50,000 each. In Illinois the annual cost ex-

3. R.A. & E. page 71; XIX The Bar Examiner, 42 *et seq.*; 36 *A.B.A.J.* 623 *et seq.*

4. Statements of fact are based on the research underlying R.A. & E., especially at page 71 *et seq.*

ceeds $20,000. In each of seven jurisdictions the cost is less than $1,000 annually. In twenty it runs from $1,000 to $5,000 annually; in five, from $5,000 to $10,000; and in two from $10,000 to $20,000.

The average annual expenditure per jurisdiction is about $9,000; and the average yearly cost per examinee seems to be about $30 per applicant throughout the country.

Professor Kirkwood states[5] that the size of the Boards of Bar Examiners in the several admitting jurisdictions "ranges from three to fifteen, the commonest number being five (in eighteen states), three (in thirteen states), seven (in seven states) and nine (in six states)". The same writer adds that,

> Since they [the members of the boards of examiners] are to be concerned in large measure with the educational qualifications of applicants, the board members themselves should possess adequate educational background. To operate effectively they must be aware of changing educational methods. This implies a willingness and capacity to inform oneself as to existing educational practices.

That some members of some examining boards do not measure up to the standards stated and implied in the above quoted sentences will become clear later in this discussion.

At page 26 of the Report of the Advisory and Editorial Committee the same writer comments briefly on the desirability of examining boards devoting themselves to matters of policy, and employing qualified assistants to prepare and grade examinations. He says:

> If the board members are called upon to carry a heavy load of work in preparing and grading examinations as well as determining policies, and in many quarters it is felt that they should, it seems evident that they should be compensated. It may well be argued, however, that better results can be achieved by the employment of assistants to carry on those tasks. The Board can then devote its attention to determination of policies and checking on results of the work of the staff. For such duties experience shows that very able lawyers can be had without compensation. The satisfaction that comes from the rendition of a valuable public service is its own reward even though the demands upon their time are very substantial.

One State Board Wants the "Right Answer" to Questions

The Report of the Advisory and Editorial Committee shows[6] that, by and large, the questions submitted to candidates by the examining authorities could be greatly improved and the educational processes and practices of the law schools aided and encouraged. But in at least one jurisdiction the examining authorities are quoted as having stated that they wish the candidate to give the "right answer" to questions, and that they are not interested in a discussion of fundamental principles.

The variation in the number of questions given by the several admitting jurisdictions, the hours per day, and the total number of days and hours, and the minutes allowed per question are interestingly discussed and shown at pages 96 to 100 of the Report of the Advisory and Editorial Committee.

The existing practice of each admitting jurisdiction formulating, setting, correcting and grading its own examinations seems to preclude cooperation between the law schools and boards of examiners.

> The deans were questioned about their relationship with the bar examiners. Here there is pretty general opinion that the bar examiners and the law schools are not working so closely together as they should. Under the arrangement generally prevailing, there is no way for the law school teachers and the bar examiners to discuss their common problems. Well over half of the deans questioned say that they are never asked for criticisms of the examinations given in their states. Indeed, many indicate that they get a look at the examinations only by accident, and some report that a look cannot be had even if it is diligently sought. In only seven states does there appear to be a well established practice by the bar examiners of soliciting the aid and criticism of the law school faculties.[7]

To anyone who has had experience with the beneficial results of close co-operation between a board of bar examiners and the law schools the general situation presented in the quotation is little short of amazing.

According to facts developed in the Report of the Advisory and Editorial Committee, a total of some sixty subjects offered for study in the law schools of the country are examined upon by the bar examiners of the country each year.[8]

Number of Subjects Covered Varies from 17 to 28 or More

Eight jurisdictions cover seventeen subjects or less; ten and the District of Columbia cover from nineteen to twenty-one; six cover twenty-two or twenty-three. It thus appears that in their bar examinations half the admitting jurisdictions cover or attempt to cover twenty-three subjects or less. Twelve jurisdictions cover from twenty-four to twenty-six subjects, and one-fourth of the jurisdictions cover twenty-eight or more subjects on the bar examinations.

The researches of Professor Stevens disclose that the subjects covered by bar examinations range from agency to workmen's compensation. The details given by him are sufficiently interesting and important to be set forth here at length. They appear in the table below.

Agency—Covered by 44 states and the District of Columbia.
Administrative Law—Covered by 16 states and the District of Columbia. In two of them, it is on the optional list.
Bailments—Covered by 18 states. In one of them, it is on the optional list.
Bankruptcy—Covered by 12 states and the District of Columbia. In one of them it is on the optional list.
Carriers—Covered by 10 states. In two of them, it is on the optional list.
Common Law Pleading—Covered by 6 states.
Common Law Practice and Procedure—Covered by one state.
Community Property—Covered by 5 states.
Conflict of Laws—Covered by 32 states. In three of them, it is on the optional list.

5. R.A. & E., pages 26, 28.
6. Page 93.
7. The seven states are California, Louisiana, North Carolina, North Dakota, Oregon, Pennsylvania and Virginia. (R.A. & E. page 100).
8. R.A. & E., "The Number of Subjects Covered in Bar Examinations", page 18 *et seq.*, by Professor George Neff Stevens.

Constitutional Law—Covered by 46 states and the District of Columbia.
Contracts—Covered by all states and the District of Columbia.
Corporations—Covered by 46 states and the District of Columbia.
Courts—Covered by 3 states.
Creditors' Rights (Debtors' Estates)—Covered by 6 states. In one of them, it is on the optional list.
Criminal Law—Covered by all states and the District of Columbia.
Damages—Covered by 11 states. In one of them it is on the optional list.
Domestic Relations—Covered by 36 states and the District of Columbia. In three of them it is on the optional list.
Elementary Law—Covered by one state.
Equity—Covered by 45 states and the District of Columbia.
Equity Pleading—Covered by 5 states.
Executors, Administrators, Guardians—Covered by 5 states.
Extra Legal Remedies—Covered by 2 states and the District of Columbia.
Evidence—Covered by 47 states and the District of Columbia.
Federal Pleading and Practice (Federal Jurisdiction and Procedure)—Covered by 11 states. In one of them it is on the optional list.
Future Interests—Covered by 6 states. In one of them, it is on the optional list.
Insurance—Covered by 20 states. In three of them it is on the optional list.
Judgments—Covered by one state.
Labor Law—Covered by 3 states. In one of them, it is on the optional list.
Landlord and Tenant—Covered by 6 states. In one of them, it is on the optional list.
Legal Bibliography (Research Problem)—Covered by 3 states. In addition, the survey indicated that 4 states cover this subject on the oral examination for admission to the Bar.
Legal Ethics—Covered by 34 states and the District of Columbia. In addition, the survey indicated that 10 states also cover this subject on the oral examination for admission to the Bar. Apparently, 13 states do not cover it either on the written or on oral examination.
Legal History—Covered by 3 states. In addition, the survey indicated that 7 states cover the subject on the oral examination for admission to the Bar.
Local Statutes—Covered by 4 states.
Master and Servant—Covered by 2 states.
Mining Law—Covered by 3 states.
Mortgages—Covered by 20 states. In one of them, it is on the optional list.
Municipal Corporations—Covered by 15 states. In three of them, it is on the optional list.
Negotiable Instruments (Bills and Notes)—Covered by 44 states and the District of Columbia.
Oil and Gas—Covered by one state.
Partnership—Covered by 35 states and the District of Columbia. In two of them, it is on the optional list.
Personal Property—Covered by 41 states and the District of Columbia.
Personal Rights (Persons)—Covered by 7 states. In one of them, it is on the optional list.
Pleading—Covered by 47 states and the District of Columbia.
Pledges—Covered by one state.
Practice—Covered by 36 states and the District of Columbia.
Public Utilities—Covered by 10 states. In two of them, it is on the optional list.
Quasi Contract—Covered by 3 states. In two of them, it is on the optional list.
Real Property—Covered by all 48 states and the District of Columbia.
Remedies—Covered by 2 states.
Sales—Covered by 26 states. In one of them, it is on the optional list.
Statutory Construction—Covered by 5 states.
Suretyship (Security Transactions)—Covered by 22 states. In two of them, it is on the optional list.
Taxation—Covered by 15 states and the District of Columbia. In three of them, it is on the optional list.
Torts—Covered by 47 states and the District of Columbia.
Trade Regulation—Covered by 3 states. In one of them, it is on the optional list.
Trial and Appellate Practice (Appeal and Error)—Covered by 2 states.
Trusts—Covered by 28 states. In two of them, it is on the optional list.
Water Rights—Covered by 3 states.
Wills (Wills and Estates, Probate, Decedents' Estates, etc.)—Covered by 39 states and the District of Columbia.
Workmen's Compensation—Covered by one state.
Oral examinations in seven states include questions on current topics.
Oral examinations in three states include general nonlegal questions.

It appears that forty of the sixty subjects are covered by less than half of the examining jurisdictions. Professor Stevens says that of the remaining twenty subjects, seven (sales, trusts, conflicts, legal ethics, partnerships, domestic relations, and practice), are covered by more than one-half but less than three-fourths of the examining jurisdictions.

At page 23 of his monograph Professor Stevens says that his survey

> indicates that there are eleven subjects which 90% or more of the states through the agencies responsible for selecting bar examination subjects feel are essential. These eleven subjects, Contracts, Criminal Law, Real Property, Evidence, Pleading, Torts, Constitutional Law, Corporations, Equity, Agency, and Negotiable Instruments, and probably Personal Property (85%) and Wills (81%), might well be considered fundamental subjects—fundamental in the sense that all lawyers should have detailed knowledge of the rules of law in these subjects, an understanding of the purposes of, and the reasons behind, these rules and principles, and an ability to apply and use this knowledge and understanding in the solution of specific problems. These are the subjects upon which a model, or standard, bar examination might well be based.

The same investigator says, at page 16a of his monograph, that his survey

> shows plainly that in three-fourths of the states there is not a clear understanding of the scope and coverage of the bar examination.

At page 30 of his study, Professor Stevens makes the following statements, which are pertinent here:

> The answers to this part of the survey *clearly indicate* that the scope and content of the bar examination are the concern of the Courts, the bar examiners and the law schools. All three are interested in achieving the same end—a better trained bar. However, the survey shows that all too frequently there is complete lack of understanding of what the Courts and bar examiners have in mind on the one hand, and what law schools are trying to do on the other. Many of those who participated in this survey, deans, chairmen of boards of bar examiners, examiners and state representatives, recognized this defect.
>
> In view of this great need for mutual exchange of ideas between examiners and law school faculties[9],

9. Professor Kirkwood stresses the same need.

one step which could be taken and should be taken *in every state* not now doing so is the creation of a joint conference composed of the examiners, law school faculty representatives, state and local bar association representatives and a member or members of the highest state court, as representatives of the Court. This group should meet at least twice a year. Its purpose should be to acquaint the whole group with the objectives of each of the participating groups, and to iron out problems arising from real or believed clashes of objectives. [Italics supplied.]

To those who have read Professor Kirkwood's monograph it will be apparent that the co-operation suggested by Professor Stevens resembles the plan that has been in operation in California for many years, except that the objectives stated by Professor Stevens do not reach as far as the objectives or accomplishments of the California plan.

But after all, as Eugene Glenn, Chairman of the National Conference of Bar Examiners, pertinently asks in "A Chat about Bar Examinations" (45 *The Brief* 253), "What is a bar examination intended to accomplish?"

Bar Examination Should Test Legal Reasoning and Knowledge

He then answers his own question and, considering the present curricula of the law schools, the answer he gives is as good as any that has been given. It follows.

> Of course [writes Mr. Glenn] the purpose of the bar examination is to determine which applicants are to be granted a license to practice law. Therefore, a bar examination should be a test of professional competence in legal reasoning and legal knowledge. A bar examination should be designed to test whether an applicant has learned to use legal principles and not whether he has memorized a lot of legal rules. It is true that an applicant must be able to draw on his memory for a good many rules of law to pass an analytical type of question, but this is secondary. An applicant who is eligible to sit in an examination should be presumed to know a great many rules of law. The prime question the bar and the public are concerned with is—can the applicant make use of these rules in a lawyer-like manner when he is confronted with a fairly complicated set of facts. We want to determine what capacity the applicant has for independent thought and reasoning rather than his capacity for uncritical absorption and retention of information. It should be borne in mind that a bar examination is not testing practicing lawyers. It is testing law students. All the examiners can hope to do is to determine whether the applicants have the potential to develop into lawyers, so they can't expect them to know the innumerable things that are better and more easily learned in the school of experience and probably for that reason, as well as the lack of time, are not taught in the law schools. It therefore follows that students should be examined on the basis of their law school training and not the so-called field of practical law. A good examination is the one which sifts the applicants who have received at least average grades in at least average law schools from the mediocre and poor students. If the bar examination grades of applicants from good law schools are approximately in the same order as the applicant's law school grades, then the examination has done a good job of testing.

Assuming that the subjects of a bar examination have been selected, there remains the difficult task of formulating and drafting the questions to be set in order to accomplish the results mentioned by Mr. Glenn. This is a task that one cannot adequately perform unless he is specially equipped for it.

Professor James E. Brenner, among others, has stated the problem which is involved here in a manner that has probably met with general agreement. He says[10]:

> *Drafting bar examination questions is a science.* Some persons may be born with this gift, and possibly some may acquire it. The evidence does show, however, that there are a good many persons who attempt to draft bar examination questions who were not born with the gift and who have not acquired it.
>
> Some Bar Examiners attempt to design original questions, others take them from recently decided cases, some borrow them from other bar examinations or law school examinations, and others get them from different sources. The result is likely to be the same in any case. If the Bar Examiner is not gifted as a draftsman, it will be a coincidence if his questions turn out to be good ones.
>
> Even those who possess this gift cannot prepare satisfactory questions unless they have the time that is necessary to prepare a scientific draft and carefully brief the points which are included in the question. Lawyers with the ability of most of our Bar Examiners do not brief a point of law on appeal in an important case in a few hours. If three or four points of law are involved in the case, as is frequently true with a good bar examination question of the comprehensive type, it may take several days to prepare the brief. How many bar examiners have the time to devote three or four days to the preparation of each bar examination question for which they are responsible?
>
> If they had the time they probably could not afford to do it. The compensation, if any, received by most examiners is merely nominal and does not justify our requiring them to devote more than a few days each year to their assignment as bar examiners. An attorney who has been appointed to the Board of Bar Examiners because he is an outstanding lawyer usually will not have the time required to draft good questions, and one who has been appointed to the position because the appointing body feels he needs the small compensation the position offers will probably not have the ability. [Italics supplied.]

On the same subject Charles English, one-time Chairman of the Pennsylvania Board of Law Examiners, expressed the point as follows:[11]

> For my part I should deem it unfair to the applicants for admission to the bar if the members of the state board, on their own initiative and without assistance of any kind, were to undertake to prepare questions for examination and to mark the papers. We do not have the leisure nor the *special training* to do either of these things with justice to the student while we are busy as all of us are in practicing law. [Italics supplied.]

Bar Examinations Criticized on Four Grounds

It may be safely concluded that law school teachers, and others competent to judge, have adversely criticized the bar examinations, and the criticisms are persistent, on the following stated grounds, among others:

(Continued on page 1054)

10. 9 *The Bar Examiner* 76. See also, Will Shafroth in 1 *The Bar Examiner* 160 (1932); Charles E. Carpenter in 1 *The Bar Examiner* 307 (1932); L. Dale Coffman, 36 A.B.A.J. 623 (1950). I know of no substantial dispute about this precise matter.

11. Quoted by Professor Brenner.

Advancing the Administration of Justice:

Legislative Responsibility for Court Reform

by Tom C. Clark • Associate Justice of the Supreme Court of the United States

■ Recalling the words of De Tocqueville written a century ago, "The strength of the courts of law has always been the greatest security that can be offered to personal independence", Mr. Justice Clark offers constructive criticism of our state judicial systems. Despite notable progress in many jurisdictions, much remains to be done, he declares, and it is the primary responsibility of the Bench and Bar to lead in the task of advancing necessary legislative and constitutional reforms of the judicial systems. This is the address that Justice Clark prepared for delivery at the Judiciary Dinner of the United States during the Annual Meeting of the Association in Washington early in the fall.

■ I am most grateful for the opportunity to share this rostrum with the distinguished representatives from our sister English-speaking democracies and with our own honored Chairman of the Conference of Chief Justices and the able President of the American Bar Association.

As one of the most recent judicial appointees present, I am almost reluctant to discuss the subject of judicial reorganization before this gathering of eminent lawyers and jurists, many of whom bring here a richer experience and greater wisdom than my own. I feel somewhat like the Brigadier General whose position in the hierarchy of field officers was described by an old top sergeant as "the lowest form of general". However, I am reassured by my discovery this past year that Justices of the Supreme Court, popular belief to the contrary, never have the last word. My mistakes and oversights, while not available as reversible errors, are not likely to go unchallenged, if only by the omniscient student editors of our law reviews.

The French philosopher of democracy, De Tocqueville, has long been a favorite of American judges. This, I am confident, is not solely because of his flattering toast that "The peace, prosperity and the very existence of the Union are vested" in the judges. But that tribute at least establishes his qualification as an authority so that I may mention more seriously the observation in his brilliant study of American democracy a century ago that judicial power "is . . . peculiarly adapted to the wants of freedom . . . . The strength of the courts of law has always been the greatest security that can be offered to personal independence; but this is more especially the case in democratic ages."

In the period since De Tocqueville wrote, the relation of the judicial function to the other processes of the law has in some respects been modified: legislation rather than judicial lawmaking has become the principal source of the law's growth, and the administrative process now accounts for much of the total volume of adjudication. However, these developments, when considered in the context of judicial review, have confirmed the relation as De Tocqueville saw it between the strength of the judiciary and the security of our republican form of government. Courts that lack for courage and independence make a mockery of the democratic principle. This precept has persistent timeliness. In the perspective it affords, your efforts to strengthen the judicial function are of the greatest importance to the future of democratic institutions.

Judges Have Adhered to Duty Despite Strong Attacks

Today our concept of freedom is being hammered by a new tyranny which is all the more menacing because by infiltration it attempts to destroy us. Our courts for some time have been under strong and persistent attack, our procedures ridiculed, our motives falsely represented, and our decisions derided. Despite this infamous world-wide campaign we have proudly seen our judges magnificent in their adherence to duty. However, we must not compound our troubles by failing to improve our judicial process. We must not be indifferent to opportunities for the

improvement of the judiciary merely because it is under attack from abroad or because we also have urgent international responsibilities.

Indeed, ours are favorable times in which to promote a general program for advancement of the administration of justice. The strengthening of our institutions for the impartial vindication of individual rights will further challenge alien systems and support our policy of a free and peaceful world. Such an objective should appeal to the high patriotism of our citizens and reinforce our allegiance to the institutions of democratic government. Moreover, the administration of the courts is an area of government in which progress is favored by wide general agreement as to objectives among the public and their legislative representatives on the one hand, and the Bench and Bar as proponents of judicial reform on the other. All of us demand a system of just, inexpensive and prompt determination of controversies by courts whose independence and efficiency will promote the general security and protect and preserve individual rights.

To say that our state courts are seriously in need of modernization is not to minimize our appreciation of the high standard of performance which they have maintained. But the operation of our courts must be adapted, as we would adapt any institution or business, to the progress, the ever-changing needs and the growing experience of a free people. Anachronisms in judicial organization and management must be excised, and the elements of permanent value retained. The problem was clearly indicated by a Minnesota committee several years ago:

> The explanation of the inadequacy of our present judicial system lies in the fact that it was adopted to meet the needs of an earlier day having a simpler civilization and very different economic and social conditions. It has never been adjusted to the tempo of the present day, with all of its economic and social complexities. . . . Little attention has been paid to coordination or the orderly development of what could properly be called a judicial system. Rather lack of system became the rule.

Strain on Judicial Organization Is Shown by Delay of Cases

Modernization has been effected to a large degree in some states, and their notable progress affords a pattern for action in jurisdictions in which the existing court structure is not yet geared to perform the heavy demands imposed upon it. In the latter states the telling symptom of the strain on judicial organization is the inability of the courts to dispose of the business before them with reasonable promptness. For example, the last report of the Judicial Council of New York State reflects alarming delays in cases filed in metropolitan centers. In New York County there was a delay of thirty-two months between the docketing and the trial of a jury case; in Kings County it was twenty-seven months; Queens was somewhat better with a twenty-one-month delay, while the Bronx had the relatively good record of eighteen months. Likewise, the Judicial Council in Connecticut in its most recent announcement reported that delay in the trial of jury cases in the more populous counties had resulted in almost three times as many suits remaining on the docket as in 1946. In Wayne County (Detroit), Michigan, the delay between the time a case is ready to be tried and the trial was reported to have skyrocketed from a minimum of ten months in 1938 to twenty months ten years later. In Texas at the time of the most recent report 94,949 cases had remained on the dockets untried for over a year, and 66,625 for over two years.

I have referred to these states only because they are among the few for which statistics are available. Seventeen states, perhaps because they are reluctant to verify that delay exists in their courts, have failed to provide statistics showing the condition of their dockets. The disturbing fact is that only five states have complete statistics available, although such information is requisite to evaluation of the judicial needs of a jurisdiction. However, there is strong reason to believe that in most of the states there are unreasonable delays.

Generally speaking the difficulty is not that there are too few courts or judges. Although judges in metropolitan areas are often overworked, judges of comparable jurisdiction in other districts are hardly kept busy. This difference is not the doing of the judges, for all of them would prefer to stay busy; it results from a failure of administration that prevents the full utilization of judicial manpower. The chief difficulty is the lack of central control over the judiciary by a responsible administrator with authority to assign and transfer judges and cases from court to court as conditions require. As Chief Justice Vanderbilt's monumental survey has disclosed, there are eleven states in which neither the state supreme court nor any central agency has control over lower courts; seven states in which the highest court possesses such power but has not exercised it; ten states in which there is a minor degree of administrative control, limited, however, to courts within a narrow geographical district and not exercised on a statewide basis; sixteen states which have some partial measure of control through a central state authority; and only four states which have a central state court or agency with the degree of effective control over court business which is necessary to administer properly the affairs of the judicial branch.

Another factor handicapping the courts in many jurisdictions is the absence of judicial authority to adopt rules of procedure. The principle of judicial responsibility for rulemaking has been accepted as to civil proceedings in only twenty-three jurisdictions and as to criminal proceedings in only fourteen. Legislative occupation of the rulemaking field has made it impossible for courts to replace time-consuming and excessively technical procedures with simple, easily applicable rules designed to facilitate the conduct of lawsuits.

Further inadequacy in many of our judicial systems results from unsatisfactory organization of the inferior

courts. Characteristically in our states there are minor courts of concurrent jurisdiction without sufficient business among them to justify multiple units. Often courts which combine the functions of chief executive of the county are administered by persons chosen for their business or administrative skill rather than for their knowledge of the law. Probate and other matters are subject to almost interminable delay because retrial is permitted after the decision of the inferior court. Juvenile and family matters which are of primary importance for the very existence of our society are not infrequently sandwiched in at times when they receive only summary consideration. Justices of the peace and similar courts handling minor offenses such as traffic violations are in many communities influenced by political considerations, and in all but two states there is no requirement for professional training of the magistrates which preside over them. Yet these are the courts in which one in five of our citizens appears every year and which shape in large measure the popular impression of the administration of justice. The picture they present is one of costly and prolonged proceedings and of judicial determination with all too often a meager quality of justice. Consolidation of the jurisdiction of the inferior courts, improvement of the professional qualifications of their judges, and the integration of these courts into a unified state judicial system are essentials.

The improvement of judicial organization and administration in the various jurisdictions must be supplemented by revision of the methods of selecting judges, and of the conditions of their tenure and compensation. In thirty-five states there is a requirement of popular election of most judges; in only six states are both trial and appellate judges appointed, and in only three of these do they hold office during good behavior. Moreover, in twenty-three states the justices of the state supreme court are paid $10,000 a year or less and in ten more states the salary does not exceed $15,000 a year. The necessity for expensive or distasteful political activity, the brief tenure of office, and existing constitutional or statutory limitations on compensation have discouraged many persons of high ability from judicial service and have undoubtedly made it difficult for many of those who have served to maintain an impartial attitude.

Improvement of the administration of justice in our courts depends upon the fulfillment of three objectives: unity of administration, simplicity of organization, and integrity and ability of the judges. The advancement of our state judicial systems requires that these objectives be recognized as of co-ordinate importance, that no one of them be neglected or sacrificed. The problem was put well by Dean Pound with characteristic vision many years ago: "Things are done by the combined working of men and machinery. . . . Our ideal must be the right men with the right machinery."

In a notable address last year on the occasion of the first meeting of the Conference of Chief Justices, the Chief Justice of the United States related to you the successful work of the Bench and Bar in securing the adoption by Congress of the administrative program now followed in the federal courts. Our distinguished Chief Justice pointed out that in a short dozen years the program has assumed first importance in maintaining the federal courts on a sound and businesslike basis. He suggested that this Conference consider the desirability of establishing comparable administrative organizations auxiliary to the state courts. Chief Justice Vinson then declared significantly that those to whom state judicial officers "must turn for authority—the legislatures—have not in most cases sanctioned programs as ambitious as . . . are necessary". He counseled that "You must convince . . . the legislature in your state that continuing improvement in court administration through adoption of businesslike methods is vital to public confidence in . . . the courts."

Fabian Bachrach

TOM C. CLARK
Associate Justice, Supreme Court of the United States

The present responsibility of our state legislatures is as broad as the needs of their people for an independent, competent and efficient judicial process. But the task of advancing the necessary legislative and constitutional proposals is one for the Bar and particularly for the judges. In some jurisdictions judges have been counted among those favoring these recommendations. Further progress, however, will be difficult if not impossible unless the outspoken support of the judiciary is forthcoming. If the judges of a state do not take front-line positions in behalf of these fundamental proposals, the lawyers can hardly be expected to stand vigorously for changes in the structure of the courts before which they practice. But the interest of the judges should be expressed in recommendations made jointly with spokesmen of the Bar and the public, preferably through judicial councils or other representative bodies.

The responsibility that rests upon our legislatures will not go unperformed when the needs of our democratic judicial process are brought before them by the united appeal of lawyers, laymen and judges. The leadership of the lawyers and judges of this Section of Judicial Administration has been instrumental in the progress that has been made. It continues to be needed for completion of the task so ably begun.

A Problem of Law Enforcement:

The Alliance of Crime and Politics

by Adlai E. Stevenson • Governor of the State of Illinois

■ The alliance of crime and politics has had nationwide attention focussed upon it by the investigations of the Kefauver Committee. As Governor of Illinois, Mr. Stevenson is one of many political leaders, both Republican and Democratic, who believe that this is one of the most serious dangers facing the country today. In an address to the Section of Criminal Law at the Annual Meeting in Washington, Governor Stevenson placed a large share of the blame for corruption in government upon the indifference and cynicism of many "solid citizens" who see nothing wrong with slot machines in their private clubs while they deprecate their presence in the corner pub.

■ A few months ago the Illinois State Police, acting upon my orders, launched a program of raiding notorious gambling establishments throughout the state.

This action was widely heralded as a "crackdown" against commercialized gambling in Illinois. But it wasn't only a crackdown. It was a breakdown as well—the breakdown of local law enforcement, the breakdown of decency in government in many parts of the state, the triumph of greed, corruption and, perhaps worst of all, cynicism.

In ordering these raids, I did not feel the joyful exhilaration of a knight in shining armor tilting with the forces of darkness. I felt more like a mourner at a wake. For something had died in Illinois—at least temporarily. And what has happened in Illinois is by no means unique. The formation of the Senate Crime Investigating Committee, under Senator Kefauver's able and effective leadership, as well as the fact that you have chosen this subject for your Annual Meeting, indicates that organized commercialized crime is in reality a menace throughout the country.

I was not, I repeat, happy about the State Police raids in Illinois. They were a last resort. In Illinois, as in most states, the enforcement of the general criminal laws traditionally has been a local matter, with responsibility resting squarely upon local officials—the county sheriff and state's attorney, and the mayors and city police. That is as it should be. Government should be as small in scope and as local in character as possible. And, if all local officials in Illinois had done their sworn duty, as many of them have, there would have been no occasion to use the State Police.

But almost from the moment I took office I was besieged by urgent requests from outraged citizens who complained that open gambling and other forms of vice were rampant in their communities, and that they could secure no action from local officials. I was reluctant to use the State Police, despite insistent demands. For over a year prior to the first raids, Attorney General Elliott and I attempted to stop commercialized gambling by several methods. We found direct talks with local officials of offending counties and personal persuasion the most effective method. The local authorities co-operated with us in many cases. In others we were successful only temporarily, or in part, or not at all. On the whole, however, the results were reassuring, and commercialized gambling dried up in many counties.

People Are Stronger Than Criminal Element

But, even after these conferences, some local officers failed to act. Hence the raids by the State Police. The evidence obtained by the police is turned over to local prosecuting authorities. They can no longer claim to be ignorant of the existence of organized gambling in their counties or that they have been unable to obtain evidence upon which to base a prosecution. The evidence is there. If these officers fail to do their duty now, they must answer to the people, and, if nothing happens, it is the people's own fault, because

the people are stronger than the gamblers or any other criminal element.

Our campaign against commercialized gambling has resulted in what the *St. Louis Post-Dispatch* referred to the other day as a "new kind of pay-off"—the pay-off of success, of new and increased respect for law enforcement, the pay-off of the satisfaction which every decent citizen can take in the fact that commercialized gambling, with all its poisonous effects upon the quality of local government, is at its lowest ebb in Illinois. As evidence of this change, the Collector of Internal Revenue for the central and southern Illinois counties reports that federal tax stamps for gambling devices have declined 40 per cent in one year.

Some people have urged that the state take over the enforcement of the criminal laws, and that the State Police should make wholesale raids and arrests. Apart from any constitutional and legal considerations involved, I have three objections to this, at least so far as our situation in Illinois is concerned.

First, the state does not now have the resources to assume this responsibility. Our State Police force has its hands full patrolling the highways, enforcing traffic laws, and cracking down on overweight trucks—in other words, in performing the functions for which it was primarily intended. Second, the use of state officers to enforce the general criminal law when local officers are already charged with that responsibility would mean that the public would be paying for law enforcement twice—and this at a time when both state and local government need more revenue, and the public is demanding economy in government. The third and most fundamental objection is that such a move would be one more step in the abdication of local governmental responsibility, one more example of the growing and dangerous tendency to look to higher levels of government for the solution of problems that could and should be solved closer to home.

State and Federal Governments Will Act If Local Government Does Not

For the state to take over local police powers seems to me a dangerous acknowledgment of the failure of local government. But organized crime with its attendant corruption and corroding disrespect for law enforcement is even more dangerous, and, if local government cannot or will not meet the challenge, the people will demand and receive help from other levels of government, just as they have demanded and received other services which were not provided on the local level.

But, whatever our views as to who should enforce the laws, we are, I take it, all agreed that law enforcement can and must be improved. What are some of the obstacles to better law enforcement, and what are some of the things that can be done to improve it?

Securing better personnel is part of the answer, but only part. Crime and politics must be divorced. Police forces, on whatever level of government, must be severed from partisan political control.

In Illinois one of the first things I asked from the legislature was the removal of the State Police from politics, and we now have a force which functions under a merit system. The old system was intolerably expensive and inefficient. Every time the Governor's office changed political complexion, virtually the whole police force of 500 was discharged and a new one of the proper political faith recruited and trained, only to go out when the state changed its politics again. And it is obvious that a man cannot be a good police officer and owe a greater measure of loyalty to his political sponsor than to his superior officer.

But safeguarding against political interference does not in itself guarantee a competent police force. And the fact that a man is honest doesn't necessarily make him a good policeman. Amateur crime detectors can't cope with the professional criminals of today. We need more police forces that are truly professional in the best sense of that term. Recruiting and training practices must be improved. We have made progress along these lines under our new merit system in Illinois, too, and hope to make more.

And our police must be paid adequate salaries—salaries that are not an invitation to graft and corruption. In many of our larger Illinois cities, policemen have not had a salary raise for several years, despite sky-rocketing living costs. Here again, this salary problem is tied up with the pressing need of local governments for more revenue, thus emphasizing the interdependence of so many of our governmental problems.

Obsolete Laws Should Be Repealed

Another thing we can do to improve the quality of law enforcement is to re-examine our entire law enforcement structure. Obsolescence and duplication present formidable obstacles to efficient law enforcement, and diffusion of authority makes it difficult to fix responsibility. Where responsibility cannot be fixed, public opinion has no chance to operate effectively, and the democratic process is weakened.

The basic pattern of our law enforcement structure is an inheritance from a bygone day. To this, some latter day accretions have been added more or less haphazardly. In some instances, state, county and municipal officers have overlapping or conflicting authority. The duties of the office of sheriff and constable, for example,—to say nothing of the coroner—have been largely inherited from medieval England. Some law enforcement officers are so burdened with other unrelated duties that they can give only a fraction of their time to the apprehension or prosecution of criminals. They are, at best, only part-time law enforcement officers. Some elective offices have constitutional or statutory restrictions as to succession, making it impossible for them to be manned by professional career men. I do not say that all these things are necessarily bad, but I do say that they need to be constantly re-examined in the light of present day conditions.

Of course, this problem of obsolescence and duplication is not peculiar to our law enforcement machinery. It is a problem of government generally, and the Hoover Commission report, followed by the formation of "little Hoover" commissions in approximately one-half our states, shows that the public is acutely aware of the general problem.

It seems to me that there should be similar studies with a view to improving our law enforcement machinery. Of course, there have been studies like that in the past, and I am not unmindful of the invaluable work that the organized Bar is constantly doing to improve the administration of criminal justice. But there is need for a larger, more comprehensive study, and the problem must somehow or other be dramatized for the public.

Among the questions to which answers should be sought are these:

What should be the respective roles of state and local governments in law enforcement? What controls, if any, should the state have over local law enforcement officers? Should these controls be direct or indirect? In Illinois, for example, the state's attorney is a county officer, but he is charged with prosecuting violators of state laws, and he receives part of his salary from the state treasury. Yet no state officer exercises any control over him. In some states, although not in my own, the Governor may remove any local law enforcement officer who fails to do his duty; and this has proved to be a most potent instrument for improving local law enforcement. Given some such power, I have little doubt that commercial gambling could be quickly and inexpensively ended in Illinois for keeps.

Corrupt Lawyers in Office Should Be Disbarred

There is another means for securing good law enforcement which appears to me to have been too little used—and that is the weapon of disbarment. In Illinois, for example, I should say that it represents as effective an instrument as we have for disciplining lawyers who hold law enforcement positions. This is, of course, an area where the organized Bar can be of the greatest help, and I was greatly interested in the action of the Illinois State Bar Association a few months ago in filing disbarment proceedings against the state's attorney of a county where organized gambling had been permitted to flourish under a cynical system of periodic fines. I know of no duty more clearly comprehended within our obligations as members of this profession than to live up to our oaths of office when we occupy public posts with law enforcement responsibilities.

What federal laws should be enacted in aid of state laws? Parenthetically, I am gratified that Congress seems disposed to close the channels of interstate commerce to slot machines and racing information.

To what extent should the functions of investigating and prosecuting be separated? In some states, the prosecuting attorney prosecutes only upon complaint. In other states, he is expected to take the initiative in discovering violations of the law. And in many localities the public insists that he conduct investigations but refuses to allow his office to have any investigators. The result is that the average prosecuting attorney must rely for his evidence upon a police force over whose activities he has little, if any, direction.

Combining the functions of investigation and prosecution in one officer may possibly lead to abuses, but this division of authority makes it easy to escape responsibility and encourages "buck passing". We have some counties in Illinois, for example, where the bipartisan approach has been used with singularly devastating effect. The managers of the two parties, in collaboration with the gamblers, see to it that there is always a Republican sheriff and a Democratic state's attorney, or vice versa, with the result that the citizen who wants action is told by the one that it is the responsibility of the other, and is shunted back and forth between them to no purpose whatsoever.

Public Indifference and Cynicism Are Greatest Problems

These are only a few of the questions which are worth considering. But the things I've mentioned, however important, are in a sense secondary and superficial. For the greatest obstacles to effective law enforcement are public indifference and cynicism. The greatest menace of organized crime is not the crime itself or the criminal. The greatest menace is that the public will come to accept organized crime as something inevitable, as a necessary part of our social system.

Cynicism toward law enforcement is as old as government itself. When Solon was writing the laws of Athens, he was told that laws were like spider's webs and would only entangle the poor and the weak, while the rich and powerful would easily break through them. This attitude toward law enforcement has persisted throughout the ages and, unfortunately, has not always been without some justification.

But, in a democracy, there is no justification for such helpless cynicism. Nor is there any use to place the entire blame for crime and lax law enforcement upon a real or supposed alliance between criminals and politicians and to assume that the members of the public are helpless bystanders. Organized crime cannot thrive without the active support of many elements of the community, nor without the passive support of many more elements. The respectable businessman who falls for the myth that a wide-open town is good for business is just as effective an accomplice of the criminal as is the politician who seeks to win friends by influencing people. The solid citizen who thinks that illegal slot machines are just fine for his country club but bad for the corner saloon does not realize what difficulties he is making for the persons he has elected to enforce the laws.

Of the 2700 gambling machines presently registered for federal tax purposes in 76 Illinois counties, only 800—less than one-third—are in tav-

erns and other public places. The other 1900 are in the country clubs, the fraternal organizations, the veteran's clubs, the Army posts and other places with which we do not customarily associate law violation, organized or unorganized. I ask you to consider the effect on the public mind, and the vexatious problem of law enforcement through this wholesale violation of the law by the most responsible elements of our communities.

And while we are on the subject of "organized crime", let me say that one of the most disheartening things that I have encountered is what might be termed "unorganized crime". One example of this which we have had to battle incessantly and expensively in Illinois is the persistent and flagrant violation of our very liberal laws regulating maximum truck weights on our highways. It appears, I can only conclude, that at least some otherwise reputable businessmen prefer to overload their trucks and pay the occasional and meager fines when they are caught, because it pays.

To what point, I inquire, does violation of the laws have to go, or what character does it have to take, before it achieves the status of "organized crime"? I have a feeling that this category has been a little too exclusive.

This last prompts me to call your attention to something else which is too often lost sight of. The phrase "organized crime" has, in the ears of the average citizen, a horrendous ring and conjures up visions of masked men with tommy guns, bank robberies, murders and similar high and unspeakable crimes. Our average citizen also feels, probably as a result of this lurid conception, that organized crime does not touch him very closely and is something that can safely be left to the FBI.

Senator Kefauver would, I am sure, be very quick to join me in my assurance to you that this is a highly mistaken concept. The most powerful and affluent in the world of organized crime operate in much more prosaic fields and in much less dramatic ways. They move where the money is, and this too often seems to be in such twilight zones as that of gambling where there are prohibitory laws on the books but no unanimity of moral conviction.

The happy hunting ground of organized crime is in the area where too many people are disposed to participate in the breaking of a law. What these people seem not to realize is that the law cannot be broken without the connivance of elected officials, and that open and long-continued violation inevitably means that there is corruption—a pay-off in some form or another. And corruption is a cancer which cannot be confined—a public official who has gotten in on the take for one purpose has become a captive and his usefulness as a public servant is largely at an end.

Citizens Should Be Active in Partisan Politics

I am new in politics, but I happen to believe in the value and importance of partisan political organization. I think that strong and healthy political parties are essential to our democracy, and I think also that a broader and more active participation in them by all good citizens is one of our greatest needs. But I can understand the discouragement and despair which assails those who find their own party machinery dominated by those who can fight with the aid of money supplied by the gamblers—who can, if you please, buy up all the billboards, bribe or bid highest for the services of election workers, and do all the other seemingly trivial but highly practical things which can snuff out the hopes of decent people in politics.

These are some of the facts of life about the menace of organized crime in a democracy. These are the reasons why the dropping of a fifty-cent piece in a slot machine is too often not merely a matter between you and your own conscience or budget. This is why a double standard of law observance is no more feasible in the gambling field than it is in that of burglary.

Blank & Stoller

Adlai E. Stevenson was elected Governor of Illinois in 1948. A member of the Illinois Bar, he practiced in Chicago, for most of the period from 1927 to 1941. Before becoming Governor, he served in various posts in the Navy Department, the State Department and the United Nations.

Law enforcement doesn't exist in a vacuum, and it can't be considered in isolation. The crisis in law enforcement is but one aspect of the crisis of representative government. Good government is indivisible. You can't expect good government in other departments along with dishonest or ineffective law enforcement, and you can't have effective law enforcement without honest, efficient, responsible government all down the line. And I suspect the major problem of our age is whether or not we have enough citizens who are willing to labor unceasingly to achieve good government. Wherever law enforcement continues lax over an extended period of time, it is so only because a large segment of the population does not want effective law enforcement, at least not badly enough to labor for good government as diligently as those who want bad government labor for it.

We speak glibly of the necessity for ending the alliance between crime and politics. But so long as the support of the lawless element of the community is reckoned a more potent political asset than the support of the people who are willing to

labor for effective law enforcement, this alliance will be a constant threat.

One of the most disheartening things that any conscientious official has to face is the lethargy and apathy on the part of most of the public. The malicious criticism that is leveled against us doesn't hurt so much. We have come to expect that. Every man in public life knows that his words and deeds will be twisted by knaves to make a snare for fools. The truly disheartening thing is that so many people—people who are neither knaves nor fools—just don't have enough interest, enough sense of civic responsibility, to take the trouble to make their government work better.

The ultimate answer to the menace of organized crime and to the problem of lax law enforcement is public opinion. And, above all, it must be continuously active. Too often public opinion is a sleeping giant. We have already had too many cycles of reform and relapse, too many moral crusades followed by business as usual. Just as our nation can no longer withdraw into an isolationist shell until some Pearl Harbor stirs us to vigorous action, so we can no longer afford to postpone effective law enforcement until lawlessness becomes a national scandal.

Today there are signs that the public is awakening to the twin menaces of organized crime and corrupt law enforcement. Let us hope this time that it will not be another ephemeral crusade but a true rebirth of citizen responsibility.

Walter M. Bastian Appointed Federal Judge

■ On October 21, 1950, President Truman announced the appointment of Walter M. Bastian as a Judge of the United States District Court for the District of Columbia. The appointment is particularly gratifying to all of us who know Mr. Bastian intimately and appreciate his many years of excellent work in the Association.

Mr. Bastian has served the American Bar Association well and faithfully, and in many capacities, over a period of years. He was Treasurer from 1945 to 1949, and contributed greatly to the present sound financial position of the Association. He served as Chairman of the Membership Committee in the year 1949-50. In February, 1950, he was unanimously selected as a member of the Board of Governors and took office at the Annual Meeting in September.

Mr. Bastian has been an active practicing lawyer for thirty-seven years and has carved a niche for himself as one of the leading lawyers in the nation's capital. He served as Treasurer and President of the Bar Association of the District of Columbia, in addition to having served as chairman of many committees of that Association. He has long been recognized as an outstanding civic leader and has held many positions of distinction in charitable, educational, civic and professional organizations. A biographical sketch of Mr. Bastian appeared in the May, 1950 issue at page 396.

Judge and Mrs. Bastian have two sons; the elder, Walter, Jr., is a former professor of English at the United States Naval Academy at Annapolis and at the University of El Salvador. The younger son, David, will graduate from the George Washington University Law School in November, 1950. They have one grandson, Walter III.

The Blessings of Taxation:

Recent Trends in the Law of Federal Taxation

by Erwin N. Griswold • Dean of the Harvard Law School

■ "Death and taxes" have become trite synonyms for unpleasant necessities. Dean Griswold takes a different view of taxation. Speaking before the Section of Taxation at the 1950 Annual Meeting in Washington, he reviewed recent trends in the law of federal taxation and discussed the impact of war in Korea upon the future. In this article, taken from that address, he says that taxation is the price we pay for an organized society, and that it is a benefit and not a curse.

■ Perhaps the sharpest result of the Korean invasion yet felt in our domestic scene is that in the field of taxation. Last June we were proceeding rather blithely and perhaps a little irresponsibly down a road of tax reduction, including the introduction of a bit of special privilege here and there. Now we are just completing the first step in the complicated and difficult task of sharply increasing our tax yield. The changes made to date have not, in my opinion, fully reflected the gravity of the situation. But there has been an almost complete change of direction, and that is a major accomplishment. The trend of development in the immediate future appears clear enough. It will be a hard and disappointing task to follow out the road we are now committed to. It is an enormous task to collect fifty billion dollars a year from any economy, far more intricate and complicated than is realized by laymen, and even legislators, generally. We are very fortunate indeed that we have the machinery and the experience, and a well-trained group of tax practitioners to assist in doing the job.

The details of what has been hammered out by Congress during the past two months are too recent to make it possible to offer much in the way of comment on trends, at least as far as technical matters of the tax law are concerned. However, since there is probably not a complete discontinuity, I plan to give a summary of the comments that I would have given on our taxes if our Korean troubles had not occurred. And I will then close with a few observations and comments in the light of the situation as we find it today.

Tax Court Is Most Significant Tax Tribunal

The first place that one might look for trends in our tax law is probably in the decisions of the Supreme Court of the United States. As far as the cases it decides are concerned, that Court is naturally of great importance in the tax field. However, it decides only a few cases, and those often rather late in the day. The most significant tribunal in tax cases is clearly the Tax Court of the United States, and no complete survey of trends and developments in the tax field could be made without a careful analysis of the Tax Court's decisions. That I have not attempted here, but I do suggest that a much larger part of our tax law is hatched in the chambers of the Tax Court on Constitution Avenue than in the house of the Supreme Court on Capitol Street.

In the areas in which it speaks, however, the Supreme Court is still supreme. Though its voice (or voices) may not always be clear, we must all pay close attention to what it says. It is now about thirty years that the Supreme Court has had to give rather constant attention to important federal tax questions. The first federal income tax returns were filed in 1914, but it was not until about 1920 that important tax cases began to come to the Court in any volume. During the 1920's there was a rather small but constant succession of tax cases before the Court. In that decade the Court followed a path of more or less strict construction. A new trend can perhaps be seen beginning at the time when Justice Stone was appointed to the Court in 1925. He wrote the opinions in *United States* v. *Anderson,* and *Chase National Bank* v. *United States,* which still remain landmarks in the tax law. During these same years he was laying the groundwork which finally led to the abandonment of the doctrine of intergovernmental

immunities, at least as far as salaries are concerned.

In the decade of the 1930's we find a rather curious split at the start. For several years the Government won a good proportion of its income tax cases. Some of these were of considerable doctrinal importance, like *Burnet* v. *Wells*. Others introduced important new ideas, such as *Douglas* v. *Willcuts*. But during these same years, it was almost impossible for the Government to win an estate tax case. That was the time of *Heiner* v. *Donnan*, and *May* v. *Heiner*, and the three *per curiam* decisions of March, 1931, and the *St. Louis Union Trust* cases.

Trend in 1940's Was in Favor of Government

During the 1940's the trend of decision went heavily in favor of the Government. This was the reflection of several factors. There were important changes in the personnel of the Court, and there was a war on. Rules of law fairly applicable to a tax system designed to raise, say, one billion dollars a year simply cannot be applied when the necessity is to produce fifty billion dollars a year. It took us a few years to learn that the pleasant language of *Partington* v. *Attorney General* and *Gould* v. *Gould* to the effect that taxing statutes must always be construed in favor of the taxpayer is simply inapplicable to the modern situation. During that decade victories for taxpayers in the Supreme Court were few and far between, the stock dividend decisions and the *American Dental* case being perhaps the most notable examples.

This trend continued through the 1948 Term of the Supreme Court which ended a little over a year ago. During that Term the Court decided nine federal tax cases on the merits, and all of them formally in favor of the Government. The last of these decisions was the *Culbertson* case, and the opinion there gave some comfort to taxpayers, although the taxpayer actually involved there has lost on the retrial in the Tax Court. By the close of the Term, without counting the *Culbertson* case twenty-three consecutive decisions on the merits by the Supreme Court had gone against the taxpayers. That ought to be some sort of a record.

The decisions of the 1948 Term included the *Church* and *Spiegel* cases. I shall not undertake to review them here, as they have been extensively discussed by others. Whatever may be thought of the merits of the *Church* case it does seem to have served as the catalyst which has finally gone far to straighten out an area of the tax law that had been in an unhappy state for nearly twenty years. The Technical Changes Act of 1949 has given us some sensible rules on reserved life estates and conditional transfers, and the net result, I believe, is a marked improvement in the structure of our tax law. It is fortunate that not all improvements require such time and pain in the making, but we should on the whole be grateful, I think, for the improvement which has been worked out here.

Another important decision of the 1948 Term was the *Jacobson* case. It is curious that one of the relatively few decisions of the past ten years in favor of a taxpayer had to be whittled down so soon and so much. That was the *American Dental* case, which always seemed to me to be a sort of freak. The notion that cancelled debts in business transactions were in fact gifts was never one which was very persuasive to me. The *Jacobson* decision has pretty well laid that doctrine to rest. Unfortunately, the opinion is a very long and diffuse one, much of which seems irrelevant to the point actually decided.

Other cases of the 1948 Term included the *Phipps* and *Wodehouse* decisions, both on rather technical points, and both maintaining the course of decision against taxpayers.

1949 Term Marks Changes In Trend of Decisions

With the 1949 Term—this past year—we find a rather marked change. During that Term the Court decided ten tax cases on the merits, of which five went for the Government and five for the taxpayers. Whether this represents a trend or a development I do not know. Prior to the events in Korea I had allowed myself to think that perhaps there was a real change. I should be less sure of the chances of taxpayers now—which on the whole is as it should be. Any case which gets to the Supreme Court is bound to be a rather close case. If we can have a period of real peace, we can very appropriately have some of the decisions in close cases go in favor of taxpayers. But in time of war or genuine national emergency, the balance of the scales may just tip the other way.

Of the cases decided at the last Term, I think it can be said that the most important went in favor of taxpayers. These would include the *Cumberland Public Service* decision which gives an important and needed limitation on the breadth of the *Court Holding Company* doctrine. Other important cases decided in favor of taxpayers are the *Brown Shoe Company* case, involving property contributed to a corporation by nonshareholders, and the *Korell* case, giving a literal construction to the deduction for the amortization of

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bond premium. The *Korell* case is the type of case which in my opinion should be decided in favor of the taxpayer. When dealing with a narrow technical provision of the statute I should think that it should ordinarily be given a literal construction. But that has not been the usual result in recent years. I would not have predicted the *Korell* decision. Perhaps it indicates a real trend. At any rate, it does seem to me that the case involved the sort of statutory defect which ought to be corrected by Congress rather than by the courts —as has been done with this one.

For some years we have been getting relatively few decisions in tax cases by the Supreme Court. The record of nine and ten decisions on the merits during the past two terms is relatively high. We have not yet learned that we cannot reasonably expect the Supreme Court to decide very many tax cases, or to put it another way, that the Supreme Court is not a very suitable tribunal to head up our judicial tax system as far as the general run of what might be called technical tax questions is concerned. On the whole I think that the Tax Court does a better job, if for no other reason than that it decides many more tax cases. Considering all of the other crucially important cases the Supreme Court has to decide, we can hardly expect it to deal very extensively with tax problems.

We do not get many really distinguished opinions in tax cases any more, opinions like those which used to come from Chief Justice Hughes, and Justice Stone, and from Justices Brandeis and Cardozo on suitable occasions. If I may venture a very brash and hazardous observation, it would be to the effect that there is too much law clerk in some of the current opinions. The research seems to be well and extensively done. But the style and the sweep are not often there, nor is there the conciseness or the sharpness which have sometimes been found in tax opinions. The decisions of the past two terms yield few quotable quotes, although all of us can remember passages from a number of the Court's opinions of ten to twenty years ago.

Tendency Is To Make Each Case Turn upon Its Own Facts

There is one factor in some of the Court's recent opinions which gives me real concern. It may be a trend but I hope not. This is a clear tendency to decide cases on a basis which makes every case turn on its own facts. Perhaps one of the most striking instances of this may be found in Mr. Justice Burton's opinion in the *Church* case. That involved, you will remember, the construction of the words "intended to take effect in possession and enjoyment at or after his death", as they appear in the estate tax. For many years, I have been telling my classes that I did not know just what those words meant, but that there was one thing I was sure of. That was that the word "intended" in that phrase could not be taken literally, and could not refer to the actual state of mind of the donor when he made the gift. Yet, that is just the position Mr. Justice Burton took in his *Church* opinion. It is supported by the literal language of the statute, but it hardly seems possible to administer a tax law on that basis.

Another illustration of this tendency may be found in the Court's opinion in the *Culbertson* case. It is also reflected in the opinion in the *Cumberland Public Service* case. Both these decisions seem to make the decision in nearly every case in their respective areas turn into a question of fact, with the trier of the facts coming up somehow or other with a conclusion after having surveyed and weighed all the multitudinous factual elements in the situation.

This seems to me most unfortunate. The tax law is complex enough anyway without making every case a wholly independent controversy. It would be a great help in the administration of many thousands of tax cases if the Supreme Court would utilize its opinions whenever possible to lay down rules which will help in the disposition of other cases. It may well be that this recent tendency on the part of the Court is really an expression of its basic distaste for tax cases.

Before leaving this matter, there is one more area of statistics which I doubtless ought to record, although it is very clear that any institution as complicated as a court cannot be reduced to a collection of numbers. However, the figures on the granting and denial of *certiorari* in tax cases do fit in with what I have said above about the decisions on the merits. Here is my tabulation of the results of *certiorari* petitions during the past two terms:

During the 1948 Term, eight Government petitions were granted, and one was denied, while four taxpayer petitions were granted and fifty-five were denied. Thus the Government was successful in getting 89 per cent of its cases into the Court, while the taxpayers got about 7 per cent of theirs in. But such figures standing alone are most misleading. The Government cases are very carefully selected. The fact that only nine petitions were filed shows that—while the Government was filing nine petitions, taxpayers were filing fifty-nine, or six and a half times as many as the Government.

However, there was a marked change during the past term, just as there appeared to be a change in the disposition of cases on the merits. Taxpayers fared about the same. Five petitions filed by taxpayers were granted, while fifty were denied, or a success rate of about 9 per cent. But the Government filed eleven petitions, and four were granted. Seven Government petitions were denied, which must be very nearly a record for a single term of the Court. On analysis this is not quite so startling as it might seem, for the seven petitions really boil down to involve four different problems. Nevertheless, to have four separate Government petitions denied is at least unusual. Whether it represents a trend of any sort can only be seen with time.

But now we must look ahead, and I should like to venture a few words for tax lawyers for the days to come.

Certiorari Granted or Denied in Federal Tax Cases
October Term, 1948—Supreme Court

	Certiorari Granted Taxpayer	*Certiorari* Granted Government	Total *Certiorari* Granted	*Certiorari* Denied Taxpayer	*Certiorari* Denied Government	Total *Certiorari* Denied
Income	2	7	9	40	1	41
Excess Profits	0	0	0	3	0	3
Estate & Gift	0	1	1	7	0	7
Criminal Convictions	0	0	0	4	0	4
Miscellaneous	2	0	2	1	0	1
Total	4	8	12	55	1	56

Certiorari Granted or Denied in Federal Tax Cases
October Term, 1949—Supreme Court

	Certiorari Granted Taxpayer	*Certiorari* Granted Government	Total *Certiorari* Granted	*Certiorari* Denied Taxpayer	*Certiorari* Denied Government	Total *Certiorari* Denied
Income	1	4	5	39	4	43
Excess Profits	1	0	1	0	2	2
Estate & Gift	2	0	2	1	1	2
Criminal Convictions	1	0	1	6	0	6
Miscellaneous	0	0	0	4	0	4
Total	5	4	9	50	7	57

The history of the 1920's is not going to repeat itself. We are not going to have the era of economic plenty and lowered taxes which we had looked forward to. Probably we should have foreseen that it was not to come, but we did allow ourselves to hope. Now we are confronted with reality and the pleasant dream is gone—or going. As tax lawyers, whether for the Government or for private clients we have a great responsibility in the difficult days to come.

Taxation Is a Benefit, Not a Curse

Way down in the South Seas somewhere there is a little island where there is no unemployment, no crime, no beggars, no radios, no *taxes*—and no inhabitants. We are likely to forget that taxes are a necessary concomitant of organized society, and that we are all undoubtedly very fortunate that our society is organized.

Certainly, we as tax lawyers ought to complain very little about the taxes. But I will go farther than that. I will suggest that there are few members of the Bar, indeed, few citizens, who are not better off physically and financially because there are high taxes than they would be without taxes at all. We are all so accustomed to groaning about the burden of taxes, and to thinking about how much we should have if we had for ourselves all that money we have paid for taxes, that we are apt to forget that we should never have had the money in the first place if it were not for the taxes, and that most of us would not have as much left after taxes if it were not for the taxes. Holmes put it succinctly when he said that taxes were what he paid for civilization; and that is even more true now than it was when he said it.

I do not mean to condone waste and extravagance in government expenditure. I am all for controlling that in any way we can. But by far the largest part of our tax load comes as the result of two things: (1) our highly complex industrially organized society, presenting many problems that must be taken care of and can be handled effectively only on a collective basis, (2) the present state of the world, and the need for protecting ourselves from the threats directed at our society.

A large part of our taxes during the past ten years were devoted to protecting us against the Nazi aggression. Can it be doubted what would have happened if we had not organized and provided that defense, and paid for it in part by taxes? And have we not all got more than our money's worth? And is the present situation much different? We can all regret desperately that there is such a threat to our security. But if there is a threat, is there any expenditure we make which benefits us more than that we pay to the Government in taxes?

Taxes Protect Us from Inflation

We should not forget, too, that taxes not only provide us the means of defense but they also serve another important function in times like these. They are one of our most effective protections against inflation. For most of us inflation is a far more serious financial threat than the amount we actually pay out in taxes. If the war can be kept localized, we should surely pay its cost currently, and we will be better off in the long run if we do.

I do not for a moment mean that the tax lawyer should not work for his client, help him minimize his taxes, and fight hard for him when necessary. That is all part of our adversary system, which I believe to be in general a good system. Many tax questions are necessarily complex, and they are likely to be worked out best when there is an able practitioner making the best possible presentation on each side. What I am saying is that I hope that tax lawyers will keep their perspective. They should sell their services to their clients—I hope they do—but not their souls. Taxes are not a necessary evil. They are, in times like these, a downright blessing. We should surely be quickly lost without them. Let us not forget that fact even as we act as ministers in particular cases to see that the system operates in accordance with law. But where the law is inadequate, or could be improved, let us recognize that fact, too. As the leading organization of tax lawyers in the country the Tax Section has a great

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Simplifying the Conflict of Laws:

A Bill Proposed for Enactment by the Congress

by **Edward S. Stimson** • Dean of the College of Law of the University of Idaho

■ Dean Stimson remarks that courts repeat *ad nauseam* the rule that matters of substance are governed by the law of the place where the cause of action arises and that matters of remedy or procedure are governed by the law of the forum. The difficulty, he says, is to determine what are matters of procedure and what of substance. Courts in various jurisdictions differ on whether questions of damages, burden of proof, presumptions and the like are substantive or procedural, he says, and yet there is no logical reason why persons should be subject to the laws of one state or country in some matters and subject to the laws of another state or country in other matters. He proposes a federal statute, which appears below, to remedy the situation.

■ The rules for ascertaining the applicable law could be greatly simplified. The accompanying draft statute is an attempt to do this. The difficulty with existing rules is that they differ for each subdivision of the digest: torts, contracts, workmen's compensation, etc. Are we not trying to find out what *law* is applicable? Are not the problems generic and should we not be able to state them in terms that would be independent of the particular substantive law involved or the section of the digest in which it is found?

In determining what simplified rules for ascertaining the applicable law should be, it is important that the basic objective or purpose of such rules be kept in mind. This objective is that the result of the suit be the same in whatever jurisdiction the complaint is filed. Obviously the application of the law of the forum will produce an injustice if it will give a cause of action to a plaintiff who had none by the laws of the place where the cause arose. The same injustice results if the application of the laws of the forum will deprive a party of a cause of action which he had by the laws of the state in which the cause arose.

Courts repeat *ad nauseam* that matters of substance are governed by the law of the place where the cause arose and matters of remedy or procedure are governed by the law of the forum. However, when they come to apply this rule they differ on all the questions that arise as to whether they are substantive or procedural. Damages, burden of proof, presumptions, statute of frauds, statute of limitations and questions of evidence are considered by some courts procedural and by others substantive. But what difference does it make whether these are substantive or procedural? If the application of the law of the forum will produce a result different from that which would obtain if the case were tried in the place where the cause arose, then the law of the forum should not be applied.

Courts Divide on Choice of Law Question

A case illustrating this problem is *Levy* v. *Steiger*, 233 Mass. 600. An injury occurred while the parties were in Rhode Island. By its law the burden was on the plaintiff to prove freedom from contributory negligence. The case was tried in Massachusetts by whose law the defendant had the burden of proving contributory negligence. The Massachusetts court applied the law of the forum on the ground that burden of proof was procedural. Burden of proof means that the jury must decide against the party having the burden when the evidence is evenly balanced and they are in doubt. In that event, if the case were tried in Rhode Island the jury must decide against the plaintiff, while if tried in Massachusetts it must decide against the defendant. In other words, the court decided that the plaintiff might recover in Massachusetts although on the same proof he could not have recovered in the place where the cause arose.

In twenty-six cases involving the choice of law problem on the question of burden of proof, twelve cases applied the law of the place where

the cause arose and fourteen applied the law of the forum.[1] In twenty-six cases involving rebuttable presumptions, thirteen applied the law of the place where the cause arose and thirteen applied the law of the forum.[2]

Two different times are involved in dealing with this problem, (1) the time of the conduct the legal effect of which is in question, and (2) the time of the trial. At the time of the conduct the parties were subject to the law of Rhode Island. At the time of the trial they were subject to the law of Massachusetts. In order to secure the same result wherever the case may be tried, the rule should be that the applicable law is the law to which the parties were subject at the time of the conduct the legal effect of which is in question and not the law to which they were subject at the time of the trial. Section 3 of the proposed statute adopts this rule.

The Supreme Court of the United States applied this rule in *Western Union Telegraph Company* v. *Brown,* 234 U.S. 542. In that case a telegram was sent from South Carolina to Washington, D.C. It was forwarded to Washington without delay, but was never delivered to Mrs. Brown, the addressee. This caused her to miss her sister's funeral in South Carolina. Mrs. Brown sued the telegraph company in a state court in South Carolina which instructed that a South Carolina statute allowing recovery for mental anguish applied. The United States Supreme Court reversed, holding that the District of Columbia law applied because the agents of the company were there at the time of their negligent act, as was the plaintiff. Justice Holmes said, "The injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the *time* of the act or omission complained of is obvious."

What Law Applies at Time of Event in Question?

If the court decides to apply the law to which the persons or property were subject at the time of the conduct or event the legal effect of which is in question the next problem is to determine how to ascertain what law those persons or property were subject to at that time. The courts employ three theories which are in conflict. They are the territorial theory, the domicile theory and the citizenship theory. The application of one of these theories is a denial of the validity of the other two. A case showing this is *Burr* v. *Beckler,* 264 Ill. 230. *W,* a married woman, was domiciled in Illinois by whose law she had capacity to contract. While she was in Florida she signed a note payable to her order, endorsed it and sent it to her husband. By the Florida law she did not have capacity to contract. An assignee sued her in an Illinois court. At the time of the signing she was physically in Florida and by the territorial theory subject to its law. At the same time she was domiciled in Illinois and by the domicile theory subject to its law. She might have been a citizen of Mexico and by the citizenship theory subject to its law. If the court chooses the territorial theory it must discard the domicile theory and vice versa. It cannot apply both the territorial theory and the domicile theory because they will give opposite results. It must decide, and in doing so will be obliged to abandon one theory or the other. In *Burr* v. *Beckler* the Illinois court applied the territorial theory and held the wife not liable.[3] It said, "The fact that the domicile of Ednah Tobey was in Illinois did not enable her to execute a note in the State of Florida contrary to the laws of that state, under which she was not competent to enter into a contract."

Domicile and Citizenship Theories Should Be Abandoned

The domicile and citizenship theories must both be abandoned in favor of a single standard—the territorial theory. There is no logical reason why persons should be subject to the laws of one state or country in some matters and subject to the laws of another state or country in other matters. At present our courts hold that people physically present in one state or country and domiciled in another are subject to all the laws of the state or country in whose territory they are, except its laws of divorce, adoption, legitimation and custody of children because in these matters they are subject to the law of the state or country in which they are domiciled. This is not sound. If people are subject to the jurisdiction or power of a state they should be subject to all its laws and not only to certain kinds or classes of laws. Therefore Section 4 of the proposed statute provides for the territorial theory.

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1. Young, Unpublished Thesis, Washington University School of Law Library, St. Louis, Missouri.
2. *Id.*
3. *Accord: Pearl* v. *Hansborough,* 9 Humph. 426 (Tenn. 1848); *Bowles* v. *Field,* 78 Fed. 742, 83 Fed. 886 (D. Ind. 1897); *Nichols & Shepard Co.* v. *Marshall,* 108 Ia. 518, 79 N. W. 282 (1899); *Forsyth* v. *Barnes,* 228 Ill. 326, 81 N. E. 1028 (1907). *Contra, Union Trust Co.* v. *Grossman,* 245 U. S. 412.

Section 5 of the draft statute deals with the problem that arises when the parties to a transaction are subject to different laws at the time of the conduct or event alleged to have created legal rights and duties between them. The most significant case on this question is *Commonwealth* v. *Acker*, 83 N. E. 312, a Massachusetts case decided in 1908. Acker, his wife and child lived in Nova Scotia and were citizens of Great Britain. He abandoned his wife and child and obtained a job in Massachusetts. The wife also went to Massachusetts although she was separated from the husband. The child remained in Nova Scotia. Acker was prosecuted in Massachusetts for failing to support the child. By the Massachusetts law nonsupport of the child was a crime. There was no such statute in Nova Scotia. The accused's counsel argued that the offense could not be committed if the child was outside of the state. A conviction was sustained. The court said:

> The offender is here, within our jurisdiction. While residing here he ought to make provision for the support of his wife and minor children whether they are here or elsewhere. If he fails to do this his *neglect of duty* occurs here without reference to the place where the proper performance of his duty *would confer benefits*.

The rule that was employed in this case is that, in order to determine whether personal legal rights and duties were created or continue to exist in relations between persons in different states, the applicable law is the law to which the person alleged to be under a duty was subject at the significant time and not the law to which the person claiming the right was subject. This rule would give the right result whether the substantive law involved is the law of support, contract, tort, or workmen's compensation.

What Law Should Control Transfers of Property?

Section 6 deals with the fourth major choice of law problem: what law determines whether title to property passes when the property is subject to the law of one state and the owner or one of the persons claiming title was subject to the law of another state at the time of conduct or an event alleged to have effected a transfer? Section 6 adopts the view that whether title passes depends upon the law to which the property was subject and not the law to which the owner or person claiming title was subject at the time of the conduct alleged to have constituted a transfer. This is familiar law in the case of real estate and holds good for chattels also, although the law of the domicile of the owner has been applied in some cases of transfers by will and by intestate succession. The stock example of this rule is *Campbell* v. *Sewell*, 5 H. & N. 728, an English case decided in 1860. Somewhat simplified the facts are as follows: lumber owned by an Englishman was shipwrecked on the Norwegian coast and sold there by the captain of the ship to an innocent purchaser. By the Norwegian law the innocent purchaser got title, but by the English law his title would depend upon the captain's authority to make the sale. The lumber was afterwards shipped to England and the question of the bona fide purchaser's title came before an English court. The court decided that the law of Norway determined the effect of the sale in transferring title and not the law of England. It applied the law to which the property was subject at the time of the conduct alleged to have transferred title and not the law to which the owner was subject.

Section 8 applies the same principle to intangible property and Section 7 applies it to limit double taxation arising from taxation by the state having power over the property or source of income and the state having power over the owner or earner.

A BILL

To insure the same result in each civil lawsuit in any court in which the case may be tried; to limit double taxation; and for other purposes.

BE IT ENACTED by the Senate and House of Representatives of the United States of America in Congress assembled that this act be known as the Choice of Law Act of 19—.

Section 1. (a) The Congress finds that the applicable law in any civil cause of action and the result of suit upon such a cause frequently varies with the court in which the suit is brought; that this is due to conflicting, inconsistent and unsound rules for ascertaining the applicable law; that this chaotic condition of the law causes injustice to litigants including double taxation and results in (1) arbitrary decisions contrary to due process of law, (2) application of laws other than the law of the State where the cause arose thus failing to afford such laws full faith and credit, and (3) increasing the risk of carrying on commerce across State lines thus restricting and burdening such commerce.

(b) It is declared to be the policy of this Act, through the exercise by Congress of its powers under the Full Faith and Credit Clause (Article 4, Section 1), the Commerce Clause (Article 1, Section 8, Clause 3) and the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution, to correct and eliminate the conditions described above by enacting a system of reasonable rules for ascertaining which law applies in civil suits.

Section 2. DEFINITIONS. The following words as used herein shall have the following meanings:

(a) "State" means the United States, any of its States, any foreign country and any subdivision of these which is so far autonomous as to have its own laws.

(b) "Intangible property" includes corporate stock as well as credits and other claims.

(c) "Law" means both procedural and substantive law and includes case law, statutes, ordinances, and administrative regulations. It does not include Conflict of Laws or Choice of Laws rules or authorities.

Section 3. Courts and administrative agencies must apply the law to which persons or property were sub-

ject at the time of the conduct or event prior to the trial the legal effect of which is in question.

Section 4. The law to which persons or property are subject at any given time is the law of the State in whose territory they are physically situated at that time. The law of the domicile or of the State of which a person is a citizen shall not be applied.

Section 5. In transactions between persons in different States which do not involve a transfer of title to property, real or personal, tangible or intangible, the law which must be applied is the law to which the person alleged to be under a duty was subject at the time of his conduct the legal effect of which is in question and not the law to which the person claiming the right was subject. When the person alleged to be under a duty is an individual subject to the law of one State acting through an agent subject to the law of another State the applicable law is the law to which the principal is subject and not the law to which the agent is subject. When the person alleged to be under a duty is a corporation subject to the law of several States the law which must be applied is the law to which the officer or agent of the corporation was subject at the time of his conduct alleged to have subjected the corporation to liability. The law which must be applied to determine whether a person is entitled to be relieved of a legal duty is the law to which he was subject at the time of conduct or event alleged to have entitled him to be so relieved.

Section 6. In transactions alleged to have affected the title to property when the property was subject to the law of one State and the owner or one of the parties claiming title was subject to the law of another State at the time of the transaction or event the legal effect of which is in question, the law which shall be applied is the law to which the property was subject at that time and not the law to which the owner or person claiming title was subject.

Section 7. In applying property, inheritance and income tax laws to persons subject to the law of one State who own property subject to the law of another State or receive income from persons or property subject to the law of another State the law which shall be applied is the law of the State to which the property was subject or from which the income was derived and not the law to which the owner or earner was subject. This rule applies also to taxes on the person and excise taxes when the amount of the tax is measured wholly or partly by property subject to the law of a State other than that to which the owner is subject, or by income derived from such other State. But this section shall not prevent taxation of the same property or income to the same person by several States where such States have concurrent jurisdiction over the property or source of income.

Section 8. Intangible property is subject to the law of the State to which the obligor is subject and not to the law of the State to which the obligee is subject. When the obligor is a corporation subject to the law of several States the law which shall be applied to determine the validity of transfers by assignment, endorsement, will, or intestate succession shall be the law of the State in which the corporation is incorporated (first incorporated in the case of multiple incorporation of one company). This section shall have no application to transfers by attachment, garnishment, or trustee process, nor shall it determine which executor or administrator succeeds to title on the death of the owner. When the obligor is a corporation subject to the law of several States other than those having concurrent jurisdiction over property generally, each may tax only a reasonable proportion of the obligation.

Section 9. All Statutes inconsistent with the provisions of this act, to the extent that they are inconsistent, are hereby repealed.

Do You Want a Copy of the 1950 Annual Report?

At its 1950 Midyear Meeting, the House of Delegates voted that hereafter the Annual Report will be sent only to those members who request it. The mounting cost of printing and distributing this volume, and the known fact that many copies are discarded have for some time been matters of serious concern. Accordingly, notices are now being mailed to the members, and only those will receive copies of the 1950 Annual Report who reply before December 15, 1950.

STANDING COMMITTEE ON PUBLICATIONS

1950 Ross Prize Essay:

The Use of Injunctions in Labor Disputes

by Norman C. Melvin, Jr. • of the Maryland Bar (Baltimore)

■ Mr. Melvin's study of the history of the injunction in labor disputes won him the 1950 Ross Prize, awarded annually by the Association under the terms of the will of the late Judge Erskine M. Ross, of California. The committee that made the award was composed of Judge Joseph C. Hutcheson, Jr., Chairman, of Houston, Texas; Clif Langsdale, of Kansas City, Missouri; and Warnick J. Kernan, of Utica, New York.

■ The coal controversy of last winter shed new light upon some knotty problems in American labor-management relations. Fortunately for the country, immediate issues were settled before any disaster fell upon the nation's economy. But the strike did not end before the public had been impressed by the terrifying forces inherent in the titanic struggle between a strong union and a powerful industry.

The conflict emphasized the need for a re-examination of existing labor laws, particularly the use of the injunction as an instrument of labor-management peace.

The position the Government is to take in this continuing battle between the unions and the ownership and management of industry is one of the great unsettled issues. The problem may be nearer a solution than many believe. Broad principles of policy, at least, have been defined and are settled.

The right of unions to existence, a principle for which they fought against great odds for nearly a century, is no longer seriously disputed, nor is their right to strike questioned by responsible persons. The dominant opinion, indeed, is that trade unions, endowed with authority to compel collective bargaining, are an essential part of our economy.[1]

Settled Congressional Policy Is That Unions Have Right To Thrive

Congress has recognized this principle in all its legislation on the subject of labor-management relations in recent years. The Norris-LaGuardia Act of 1932[2] was aimed at removing the labor injunction that had been used for more than fifty years to deter union organization. The Wagner Act,[3] which became law three years later, not only affirmed the right to existence, but committed the Federal Government to a policy of nurturing the unions as a vital adjunct of our society. Whatever else Congress might have done with the Wagner Act by the Taft-Hartley amendments,[4] it did not reverse the settled policy that unions not only have the right to exist, but must be allowed to thrive in a competitive society.[5]

The problem of the legislators now is to set up a body of law that will guarantee the freedom of workers to combine and use the weapons resulting from combination, and, at the same time, to protect not only the property rights of the employer, but also the interest of the public generally.

It is important in our study to note that both sides in the Taft-Hartley controversy have dedicated themselves to that objective. One group contends, however, that the law is a punitive measure, wiping out all that labor gained under the Norris-LaGuardia and Wagner Acts. The other side avers that the Wagner Act, in attempting to equalize the two forces in labor-management relations, has given unions too many privileges without counterbalancing responsibilities.

Much of the dispute is centered on the rebirth of the labor injunction, that arm of chancery which the unions believed had been laid to rest finally when President Hoover signed

1. In a dissent in 1896 from the majority opinion in *Vegelahn* v. *Guntner*, 167 Mass. 92, which affirmed the granting of an injunction prohibiting a patrol in front of a place of business, because such conduct was held to be unlawful as a conspiracy, Justice Holmes stated what is now the generally accepted view, that public policy and social advantages support the proposition that combinations of workers to enforce their demands will insure the continuation of free competition.
2. 29 U. S. C. A., §101.
3. 29 U. S. C. A., §151.
4. 29 U. S. C. A., §141 (Supp. 1949).
5. There are conflicting views as to this. See Cox, "Some Aspects of the Labor Management Relations Act, 1947", 61 *Harv. L. Rev.* 1, wherein the author states that the Taft-Hartley amendments represent the abandonment of the policy of affirmatively encouraging the spread of union organization. See also: Teller, "Government by Injunction", 35 *Va. L. Rev.* 50, 58 (1949).

the Norris-LaGuardia Act in the spring of 1932.

The potentialities of the labor injunction were discovered in the latter part of the nineteenth century by the owners of industry searching for new weapons to combat the rapidly growing power of worker combinations.

Unions have existed from the earliest days of the Republic, but initially they comprised small compact groups of skilled workmen organized into protective societies much on the order of the medieval guilds, although no guilds as such flourished in the colonies.[6] Their combined force was used to compel higher wages, shorter hours and better working conditions. The strike and the boycott were employed to achieve these aims.

Courts Were Hostile to Unions from Beginning

The attitude of the courts toward these employee organizations was hostile from the beginning. Thus in 1806, several journeymen shoemakers struck against their masters and resorted to violence and intimidation when certain of their demands were refused. In a celebrated case in the Mayor's Court of Philadelphia,[7] the cordwainers were convicted of criminal conspiracy. The court employed the precedent of English law that a combination of employees to raise their wages constituted a criminal conspiracy.

The rule that employee combinations were criminal conspiracies, *per se*, persisted until about 1840.[8] This doctrine of criminal conspiracy gradually gave way to the rule of civil conspiracy, which resulted in the workers being held responsible by their employers for conspiring in restraint of trade.

A period of trade union expansion, resulting from the opening of the West and the wave of industrial growth that accompanied the Industrial Revolution in America, began after the Civil War. Great industrialists and manufacturers, the new ruling class of the era, found the laws, as favorable as they were to their interests, inadequate instruments in their fight to shackle the unions. Money judgments obtained at law were worthless against unincorporated unions and could not be satisfied against union officers and members. Moreover, such actions not only were costly and cumbersome, but were of no avail when applied to a strike or boycott that had already taken its toll.

Historians have found it convenient to date the beginning of "government by injunction"[9] with the *Debs Case*,[10] which was decided by the Supreme Court in 1895. As a matter of fact, however, the labor injunction already had been used in state and inferior federal courts prior to the *Debs* ruling.

One of the earliest cases involving the use of the labor injunction in this country grew out of the great railway strike of 1877. A federal trial court in Indiana had appointed receivers for the Ohio & Mississippi Railway Company, against which there was a strike.

Under well-settled law the court could have found that the striking workers were interfering with the court in the orderly administration of the receivership, and that, therefore, the strikers should be enjoined from further interference with the operation of the railroad. The court, however, employed broad language to condemn the conduct of the striking employees, and declared that a combination to bring about a strike which might affect the general public was unlawful.[11]

Judge Taft Enjoins Union Under Interstate Commerce Act

In 1893, Judge (later Chief Justice) Taft, in a case involving a strike of the Brotherhood of Locomotive Engineers,[12] enjoined the union from issuing orders, which required employees of the defendant railway company to refuse to handle and deliver freight cars when hauled over the complainant road, where a strike was in progress.

He based his decision on the Interstate Commerce Act,[13] which requires a carrier to accept freight of a connecting carrier, and the decision held, in effect, that no interference with interstate commerce is ever justifiable.

The "strong arm of chancery" which was beginning to be employed in these early days against worker combinations was inherited from the English system of jurisprudence.[14] In its early stages the injunction was chancery's device for avoiding the threat or continuance of irreparable injury to property, but as time went on the concept of property was enlarged. For example, the Supreme Court has said that although equity concerns itself only in the protection of property rights, any civil rights of a pecuniary nature are property rights.[15]

The injunction proved to be an effective weapon in labor disputes. An employer, upon filing a bill in

6. Landis, *Cases on Labor Law*, Historical Introduction, page 29 (1934).

7. *Case of the Philadelphia Cordwainers*, 3 Commons & Gilmore, Doc. Hist. Am. Soc. 59-248 (1910).

8. A score of cases decided between 1806 and 1845 are catalogued in Nelles, "*Commonwealth* v. *Hunt*", 32 Col. L. Rev. 1128, 1166 (1932).

9. The Democratic national platform for the presidential campaign of 1896 denounced "government by injunction as a new and highly dangerous form of oppression". *Proceedings of the Democratic National Convention* (1896) 194f.

10. *In re Debs*, 158 U. S. 564, 39 L. ed. 1092 (1895).

11. *King* v. *Ohio & M. Ry. Co.*, 14 Fed. Cas. No. 7,800 (C.C.D. Ind. 1877). At page 542, the court said: "Every man, as I have stated, has a right to leave the service of his employer if he is not satisfied with wages he gets, but men ought not to combine together and cause at once a strike among all railroad employees, so as to prevent the running of trains, because the injury there is public in its character; it affects the whole country, as it were, and not a particular community or a particular neighborhood, and in several states is made a public offense."

12. *Toledo A. A. & N. M. Ry. Co.* v. *Pennsylvania Co.*, 54 Fed. 730 (1893).

13. 28 U. S. C. A. §2101; 49 U. S. C. A. §1.

14. But the injunction never became a factor in English labor relations. The only case of importance in the chancery records is *Springhead Spinning Co.* v. *Riley*, L. R. 6 Eq. 551 (1868), which arose from a dispute by a mill owner and a union over the use by strikers of placards to discourage others from entering the plant. The court ruled that defendants were no less amenable to the court by their acts than if they had poured noxious vapours into the mill or built a wall around it to make it impossible for plaintiffs to obtain workers.

15. *International News Service* v. *Associated Press*, 248 U. S. 215, 63 L. ed. 211 (1918). The court also said that the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired.

equity alleging a conspiracy which threatened irreparable damage to his property, could obtain a temporary injunction *pendente lite*, which, in the vast majority of cases, was usually made permanent after a hearing on the merits. Such an injunction could then be enforced by the broad powers of contempt exercised by courts of chancery, with the result that, during the pendency of both the temporary and the permanent injunction, the workers' means of enforcing their demands were paralyzed.

The court orders themselves were very broad in scope. For example, they enjoined the calling and the conduct of strikes. They prohibited picketing, sometimes limited to picketing by "violence and intimidation". They forbade boycotts, and the use of abusive speech, such as the epithets "scab", "rat" and "yellow dog". They restrained the payment of strike benefits by the unions. Usually they wound up with an omnibus clause enjoining any person "from doing any and all other acts in furtherance of any conspiracy to prevent the free and unhampered control of the business of the complainants".[16]

Although the injunction in use in these early days was effective against the unions, many unions survived, and some even grew during the period, despite the handicap. But the vast growth and expansion of unions into all fields of industrial life did not come about until after the Norris-LaGuardia Act abolished the labor injunction.

Debs Case Ushers in "Government by Injunction"

The *Debs* case, which has been mentioned previously as the case which is supposed to have ushered in the period of "government by injunction", grew out of the famous Pullman strike in Chicago of 1894. It should be noted that at the time the case was decided a vast area in industrial relations opened by the Industrial Revolution had been left uncharted by the legislative branch of the Government. With some justification, at least, the courts, acting under authority they believed inherent in themselves, began what was, in effect, an era of labor lawmaking.

Under the leadership of Eugene V. Debs, the American Railway Union sought to aid the striking workers of the Pullman Company by prohibiting railway workers from handling trains that included cars manufactured or owned by the Pullman Company. The ensuing strike choked the transportation system of the country, and on July 2, 1894, the Attorney General of the United States directed the United States Attorney in Chicago to apply for an injunction. The injunction was issued, and on December 14 Debs was imprisoned for six months for contempt, the court basing its decision on the Sherman Antitrust Act.[17]

The case reached the Supreme Court on a petition for a writ of *habeas corpus* by Debs and others, who asked to be relieved from imprisonment for contempt for disobedience of the injunction. The court affirmed the conviction of Debs, and upheld the validity of the injunction, on the ground that the Government, by its innate authority, may apply to its own civil courts for assistance, and that "the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority".

The Sherman Act had been enacted in 1890 because of the fear that the growing power of business monopolies would destroy the competitive system. That it was primarily aimed at business monopolies, and not at labor is a matter of record.[18] The fact remains that the law itself was worded in such a manner that it could be construed to cover any restraint of interstate and foreign commerce, and consequently could be interpreted as restricting the operation of labor unions. In 1909, in the *Danbury Hatters*[19] case the Supreme Court decided that labor unions came under the provisions of the Act.

This decision, and others that followed, rekindled the ire of labor unions. The doctrine, logically pursued, they argued, threatened the very existence of the unions, since, by interpretation, any or all of their activities involve, in a measure, the obstruction of "the free flow of commerce".

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Unions Obtain Remedy in Clayton Act

By 1914, under the new Democratic administration of Woodrow Wilson, the unions were able to exert enough political pressure upon Congress to obtain remedial legislation.

The Clayton Act of 1914[20] provided in Section 6:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall

16. See Frankfurter & Greene, *The Labor Injunction*, 264 ff., where a typical injunction is set out in full.
17. 15 U. S. C. A., §1.
18. See remarks in 21 Cong. Rec. 2461, 2569.
19. *Loewe v. Lawler*, 208 U. S. 274, 52 L. ed. 488 (1908). The Court held that the law prohibits any combination preventing the free flow of commerce between the states.
20. 15 U. S. C. A. §17; 29 U. S. C. A. §52.

such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws.

Section 20 of the Act was the first federal anti-injunction legislation. It provided that no injunction may issue against a strike, picketing or boycott, in any case involving a labor dispute "between an employer and employees".

Labor Hails Clayton Act as "Magna Charta"

Samuel Gompers, President of the American Federation of Labor, hailed the law as "the Magna Charta of labor".[21] The rejoicing was premature. In 1921, a union of printing press employees attempted to organize a plant of the Duplex Printing Press Company by persuading workingmen in New York not to handle products of the nonunion plant and by threatening customers of the firm with sympathetic strikes.[22] The company obtained an injunction under the Sherman Act. The union contended that the Clayton Act legalized its activities and precluded the granting of an injunction.

Now, the Clayton Act protected strikes, picketing and boycotts "in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving or growing out of, a dispute concerning terms or conditions of employment".

The question was whether such union activities were protected under this clause. The Supreme Court held they were not. It reasoned that the Act must be confined "to those who are proximately and substantially concerned as parties to an actual dispute respecting the terms or conditions of their own employment, past, present, or prospective".

Thus, because the law was obscure as to the meaning of employer-employee relationship and left undefined the "lawful" and the "unlawful" in labor activity, the Court ruled that the union, in this case, was still subject to provisions of the Sherman Act and that the injunction was proper.

In another interpretation of the Clayton Act, the Supreme Court decided that the law introduced no new principle into the equity jurisdiction of the federal courts, and that Congress was merely expressing what was always the best practice, thinking it wise to stabilize a rule of action and render it uniform.[23]

Supreme Court Neutralizes Effect of Clayton Act

In a few words, the Supreme Court neutralized the labor provisions of the law and the unions found themselves where they were before the Clayton Act was passed. The Court said, in effect, in the *Duplex* case that while the Act affirms the right of existence to unions, it does not allow them the use of the weapons needed to accomplish the purpose of their existence.

There is a sharp division of opinion as to whether the Court was justified in its course of action. The unions took up the cry that it was conclusive proof, if proof were needed, that the courts for the past thirty years had been usurping the legislative power instead of exercising their proper judicial function.[24]

Charles O. Gregory, in a recent book, says that almost "all educated opinion has been that the Supreme Court sold organized labor down the river when it construed this law".[25]

Continuing, he said:

> Here Congress said, in such unmistakable terms that only a lawyer could misunderstand its statement, that any persons acting in concert might do anything, during the course of a labor dispute, which any party to it might lawfully have done in its absence.

Whatever the merits of the opposing dialectics, the effect was to shatter what had appeared to be a labor victory. The unions at that period entered the darkest era of their history. Lower federal courts began holding unlawful such acts as picketing in the absence of strikes, and striking for any purpose which the courts themselves considered "unlawful".

During this period management struck at the very roots of union existence by invoking the so-called "yellow-dog" contract. Such a contract was an agreement in which an employee promised his employer not to join a union, the penalty for breach being termination of employment.

Court Holds "Yellow Dog" Contracts Exempt from State Prohibition

Some states outlawed the contracts, but the Supreme Court, in the *Hitchman* case,[26] ruled the state statutes unconstitutional as a violation of the sanctity of contracts. The Court reasoned that an employer is free to make nonmembership in a union a condition of employment, and that an agreement to that effect, with the free assent of the employee, is entitled to be protected. With this whip over the backs of the workers, any effective expansion of the unions could be halted before it started.

The feeling among union leaders that they could not get justice at the hands of the courts, a feeling which had been smouldering for years, erupted into an intense hatred of the judicial processes, and demands were made that Congress place a restraining hand on both the procedural and the substantive instruments employed by the courts in the labor injunction.

As a result of these demands, the Norris-LaGuardia Act was passed in 1932 during a time of severe business

(Continued on page 1058)

21. But, five days after the enactment of the Clayton Act, the then President of the American Bar Association, William Howard Taft, publicly stated that he feared that the Act as written would be construed by the courts so as to dash the hopes of labor. 39 A. B. A. Rep. 359, 380 (1914).

22. *Duplex Printing Press Co. v. Deering*, 254 U. S. 443, 65 L. ed. 349 (1921).

23. *American Steel Foundries v. Tri-City Central Trades Council*, 257 U. S. 184, 66 L. ed. 189 (1921).

24. In Teller, "Government by Injunction", 35 *Va. L. Rev.* 50, 52, the author points out that although the popular theory is that the decisions interpreting the Clayton Act are evidence of judicial hostility to organized labor, the fairer view is that the Act was badly drawn if its purpose was to accomplish what union leaders thought it did in fact accomplish.

25. Gregory, *Labor and the Law*, 166 (1949).

26. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 62 L. ed. 260 (1917).

Magistrate Courts in Okinawa:

A Contribution to Justice in the Ryukyus

by I. H. Rubenstein • of the Illinois Bar (Chicago)

■ In this article, Mr. Rubenstein describes the court system set up by the United States Military Government on the Island of Okinawa after it was seized by United States Armed Forces in April, 1945. With a population of 500,000, Okinawa presented peculiar problems of law enforcement and judicial administration for the occupation authorities. Mr. Rubenstein tells how the Army went about solving these problems.

■ The Ryukyu Islands are a group of approximately one hundred and forty small islands which form a connecting link between southern Japan and Formosa. Many of these islands are mountainous wildernesses and sparsely settled. These islands consist of the following three divisions: Northern Ryukyus, Okinawa Gunto and Southern Ryukyus. The largest and most important of all the islands in the Ryukyus is the island of Okinawa which is within Okinawa Gunto. Okinawa itself is about sixty miles in length and from two to sixteen miles in width, and has a population of approximately five hundred thousand inhabitants.

With the surrender of Okinawa to the American Armed Forces in April, 1945, the Ryukyu Islands were placed under United States Navy Military Government from that date to July 1, 1946. Since then, the Ryukyus have been and still are under United States Army Military Government.

Because Okinawa is situated midway between Tokyo, Shanghai and Manila, it is the most strategic base now occupied by the United States Army in the Orient, and has been referred to by some Americans as a "second Hawaii". There are now several American military installations on Okinawa, and a large construction there is under way.

The war left Okinawa the most devastated country in the entire world. Approximately 95 per cent of all its homes, buildings and factories were destroyed. Its transportation and communication systems were completely demolished. Almost all its livestock perished. United States Military Government has performed a stupendous and magnificent task of rebuilding Okinawa and of feeding and clothing Okinawans until at the present time the highest standard of living in the Orient is to be found in Okinawa.

Petty Larceny Plagues Island After End of War

Although Okinawans always had a reputation for being a law-abiding people, yet since the war there has been a considerable number of petty larcenies of small items of clothing and food from various military supply depots and installations in Okinawa. As these petty larcenies were of property of the United States Army, they constituted offenses against the United States Military Government, and Okinawan offenders were tried for these minor offenses by the Summary Provost Courts. These courts, incidently, are Military Government courts which have the power to sentence offenders to up to one year in prison or to fines up to five thousand yen or both. In addition to these petty larceny cases, which were the most numerous, the Summary Provost Courts also tried curfew and traffic violations, black-marketing cases, prostitution cases that concerned military personnel, and various other cases that involved petty violations of Military Government enactments. The Summary Provost Courts in Okinawa were trying over two hundred of such cases each month. This meant that every one of these cases, before they could be tried by a Summary Provost Court, had to be personally investigated by a member of the Public Safety Department of the Military Government. This Department, which is in charge of the prosecution of Military Government court cases, after the completion of such investigation, had to prepare charge sheets, which are Military Government Court indictments. Incidentally the Legal Department of Military Government provided the Summary Provost Courts from lawyers in its Department. The prosecution and trial of these misdemeanor cases consumed consider-

able time and personnel of both the Legal Department and the Public Safety Department of Military Government.

Misdemeanor Cases Turned Over to Okinawan Courts

With the approval of the Deputy Commander of Military Government, Col. William H. Craig, and the Chief Military Government Officer of the Ryukyus, Brig. Gen. Frederic L. Hayden, it was decided that the time was appropriate to vest the trial of all misdemeanor cases, including petty violation of Military Government enactments, in the criminal jurisdiction of the local Okinawan courts. To accomplish this objective, it was decided that it would be necessary to establish a sufficient number of magistrate courts in Okinawa to provide prompt and public trials to Okinawans in misdemeanor cases, and that the judges for such courts were to be selected from native Okinawan lawyers. The need for such magistrate courts in Okinawa was fourfold: *First*, Okinawa and the rest of the Ryukyus had been a possession of Japan for almost a hundred years, and the Japanese statutes were still in full force and effect in these islands except as abrogated or modified by specific and express Military Government enactment. One of such Japanese statutes gave the local police a quasi-judicial power on their own responsibility immediately upon the arrest of an offender for any minor offense as provided for expressly and specifically in the Police Offense Regulations of the Japanese Home Department Ordinance Number 16,* which was promulgated on September 29, 1908, to summarily try and fine the accused up to twenty yen or sentence him to as much as twenty days imprisonment or both. The principal reason for the abrogation of this Japanese statutory quasi-judicial power of the native police in the Ryukyus by Military Government was because of its unwarranted abuse by both the Japanese and Ryukyuan police, particularly immediately prior to and during the war and also because such arbitrary judicial power in the native police was deemed inconsistent with and contrary to democratic American judicial processes.

Second, there were only four native courts, called Local Courts, in Okinawa which had criminal jurisdiction of misdemeanor cases, but these courts were totally inadequate and insufficient in number to provide prompt trials of Okinawans in such cases. *Third*, as hitherto pointed out, it was deemed that the time was ripe to transfer the trials of all petty violations of Military Government enactments from the Summary Provost Courts of Military Government to the Okinawan court system. *Fourth*, it was in keeping with the long range policy of Military Government to make the Okinawan court system self-sufficient, adequate, independent and democratic.

Magistrate Court System Became Effective in 1947

As a result of an intensive study of pertinent translated Japanese statutes, and conferences with the Director of the Justice Department of the Okinawan Civil Administration and the Director of the Public Safety Department, Military Government, the author prepared United States Military Government Special Proclamation Number 19, entitled "Magistrate Courts", which became operative on July 18, 1947. The main highlights of this Proclamation are as follows:

First. It established a total of eleven Magistrate Courts with one such court located in the largest town in each one of the eleven police districts in Okinawa which are as follows: Itoman, Chinen, Naha, Shuri, Koza, Maehara, Ishikawa, Ginoza, Nago, Shioya and Motubu.

Second. The judges for these Magistrate Courts were to be selected and recommended by the Director of the Department of Justice of the Okinawan Civil Administration to the Chiji, who is the Governor of Okinawa. The latter was to make the appointments which were subject to confirmation by the Deputy Commander for Military Government.

Third. The Magistrate Courts were granted jurisdiction of all persons within their territorial limits, except citizens of the United States and its allies and prisoners of war and those persons over whom the United States Government may specifically or generally retain jurisdiction.

Fourth. The Magistrate Courts were empowered to try all misdemeanor cases. By Article I of this Proclamation, a misdemeanor is defined as any offense that is punishable by confinement with or without hard labor for a term not exceeding six months or by a fine not exceeding one thousand yen, which is equivalent to twenty American dollars, or

*The following are some of the offenders covered by Japanese Police Offense Regulations:

Those who have acted unlicensed prostitution or pimped or offered the place for prostitution in the first offense.

Those who wander about having no residence or occupation.

Those who have asked alms and contribution or purchase of articles compulsory.

Those who have sought an illicit profit by exaggerated or false advertisement using newspapers, magazines or in other ways.

Those who have committed a mischief to or interfered with a rite, festival or its procession.

Those who have neglected to report instantly to the police any person who needs aid due to youth, old age, deformity or illness, or dead body or still-born child found in the place possessed by them.

Those who have unlawfully put out the light of other person's target lamp or all-night lamps of shrines, temples, roads or parks of public use.

Those who have picked vegetables, fruits and flowers from another person's farm or garden.

Those employers who have interfered with their employee's liberty or treated them cruelly.

Those who have confronted another person's way or followed him tenaciously without reason.

Those who have exhibited in their shop-front foods and drinks without coverings.

Those who have set dogs and other animals on people and made them scamper away frightened.

Those who have mistreated oxen and horses and other animals.

Those who have soiled shrines, temples, places of worship, graves, monuments, statues or other things of the same kind.

Those who have won an illicit profit by mixing other things into regular food and drink.

Those who have used green fruits, tainted meat or other unwholesome food and drink to gain a profit.

Those who have stripped themselves of their clothes, exposed their buttocks or thighs or acted disgracefully in a public place.

Those who have excreted or urinated in the street or made others do this.

Those who kindle a fire at random near houses and other structures or easily ignitable things in fields or mountains.

Those who have soiled other person's houses or other structures, pasted a card on them or soiled them or removed another person's name plate or sign-board or placard indicating houses for rent or sale.

both. It also expressly gave the Magistrate Courts the right to try all petty violations of Military Government enactments, such as curfew violations, traffic violations, trespasses on military installations, prostitution with members of the occupation forces, unlawful possession, black-marketing and larceny of American property of less than one thousand yen in value; and also of all violations of the Police Offense Regulations as provided for in the Japanese Home Department Ordinance No. 16, which was promulgated on September 29, 1908.

Fifth. The Proclamation expressly provided that an Okinawan who has been arrested for a crime shall be entitled to a speedy preliminary hearing by the Magistrate Court within forty-eight hours after arrest which shall ascertain whether the offense of which the accused is charged is a misdemeanor or a felony or whether any offense was committed. If no offense under the law has been committed, the Court shall discharge the accused immediately. If the offense is a felony, the Magistrate Court shall order the case to be referred to the appropriate court having jurisdiction of such offenses. Where, however, the offense is only a misdemeanor, the court shall try the accused promptly. The accused or the prosecution is entitled to a continuance for not longer than ten days.

Sixth. The Magistrate Courts have the power to impose sentences of imprisonment with or without hard labor for a period not to exceed six months or by fine up to one thousand yen or both in all misdemeanor cases. These courts also have the authority to confiscate all illegal property, punish for contempt of court, place juvenile and first offenders on probation, release prisoners on bail or on their own recognizances, and issue summons compelling attendance of witnesses and the production of documents.

The Magistrate Court judges were appointed shortly after the enactment of United States Military Government Special Proclamation Number 19, and in the early part of September, 1947, these courts commenced to function. From that time on, these courts tried an average of approximately 550 misdemeanor cases and collected about forty-five thousand yen in fines each month. One of the immediate results of the operation of the Magistrate Courts was the sharp decline of criminal cases tried by the Summary Provost Courts from an average of roughly two hundred cases per month to about twenty-five cases each month. This meant that the Legal Department and the Public Safety Department of Military Government could devote more time to the more serious offenses against Military Government, because the previous continual backlog of minor cases in the Summary Provost Courts was completely eliminated. The Magistrate Courts performed their judicial duties smoothly, effectively and with dispatch. In over 90 per cent of the cases tried by these courts, the accused was tried within twenty-four hours after arrest. These Courts functioned in accordance with the American democratic concept of justice; thus over 15 per cent of the offenders tried were acquitted; a substantial number of first offenders were put on probation or given suspended sentences; in the overwhelming majority of cases, the offender was sentenced to pay a fine rather than to a term in prison. The Magistrate Courts in Okinawa represent one of the finest contributions of American democratic judicial processes by Military Government in the Orient.

I. H. Rubenstein has had ten years of general practice in Chicago. A graduate of DePaul Law School, he is the author of various articles in legal periodicals. During the war, he was a combat infantryman with the 30th Division in Europe, and after the war he went to the Pacific where, for eight months, he was Acting Director of the Legal Department of the Military Government, Headquarters, Ryukyus Command, in Okinawa. Photograph of author in robe as member of Superior Provost Court in Okinawa.

Association's Gold Medal:

Judge Orie L. Phillips Receives 1950 Award

■ Chief Judge Orie L. Phillips of the United States Court of Appeals for the Tenth Circuit was awarded the American Bar Association's Gold Medal, the highest honor the Association can bestow. Judge Phillips was the sixteenth man to receive the Medal. The citation read at the Annual Dinner in Washington, D. C., by President Harold J. Gallagher was as follows:

THE AMERICAN BAR ASSOCIATION, TO CHIEF JUDGE ORIE L. PHILLIPS. *By the direction of the Board of Governors of the American Bar Association, I present to you, Judge Phillips, a citation as follows:* "A master of the law but its servant, you submerge self and exalt justice. Where others might strive to turn a pretty phrase, you strive to speak so plainly that the men of the mine and the range and the office know the words for their own. Where some in high places grow aloof as the years roll on, your innate love for your fellowman and understanding of his needs and hopes have been intensified during your long judicial service. Where many a judge would be tempted to have the court withhold judgment in every case until the Opinion could be made an impregnable citadel of legal scholarship, you have given preference to the citizen's rights to a prompt determination over the court's desire for perfection. You have not been satisfied to rest upon judicial laurels but have joined with your brethren of the Bar, and, by the use of your practical talents, have again and again become their leader in their struggle to establish the reign of law in the nation and in the world. As Chief Judge of the Tenth Judicial Circuit, you devote your great gifts to guiding the dispensation of Federal justice in a territory larger than any other circuit in the country and more productive of divers kinds of legislation than most of the others put together.

"Judge Phillips, when at the semicentennial meeting of the American Bar Association it was resolved to provide a medal which should be awarded each year to a member of

(Continued on page 1049)

Here is a list of the recipients of the American Bar Association Medal:

1929—Samuel Williston
1930—Elihu Root
1931—Oliver Wendell Holmes
1932—John Henry Wigmore
1934—George W. Wickersham
1938—Herbert Harley
1939—Edgar Bronson Tolman
1940—Roscoe Pound
1941—George Wharton Pepper
1942—Charles Evans Hughes
1943—John J. Parker
1944—Hatton W. Sumners
1946—Carl McFarland
1947—William L. Ransom
1948—Arthur T. Vanderbilt
1950—Orie L. Phillips

ORIE L. PHILLIPS

THE PRESIDENT'S PAGE

CODY FOWLER

■ Some months ago the Board of Governors authorized the appointment of a Director of Activities to assist in carrying on the very extended and important programs of our Association. At the Annual Meeting in September the House of Delegates confirmed and authorized this appointment. The need for a Director is obvious to those familiar with the work of the Association. A number of possible lawyers have been considered. It is with great pleasure that I announce that Joseph D. Stecher, our Secretary, has agreed to assume, at least through the Mid-Year Meeting of the House of Delegates in February, the duties of acting Director of Activities in addition to his work as Secretary. While Mr. Stecher cannot spend his entire time in this work he will nevertheless spend a substantial part of his time in this connection. With his background of experience and knowledge regarding Association work, together with his popularity and ability to get things done, I feel that his agreement to accept these additional duties assures constructive progress in some of our most important activities. This agreement with Mr. Stecher was unanimously affirmed by the Board of Governors on November 10.

I had the pleasure of attending the meeting of the Directors of the Survey of the Legal Profession held in New York City on November 4. Benefits of the Survey are already well recognized by the members of our profession.

While in New York I likewise, on November 6, met with the Chairman of our American Citizenship Committee and the Chairman and some of the members of the Committee on Public Relations. The activities of these two committees go hand in hand and we felt it wise to co-ordinate their work to a certain extent.

From New York I went to Washington where I had the pleasure of attending the swearing in of the former Treasurer of our Association and a present member of the Board of Governors, the Honorable Walter M. Bastian, as United States District Judge for the District of Columbia. Chief Justice Fred M. Vinson administered the oath to Judge Bastian. Several members of the Supreme Court were present. The Attorney General, the Solicitor General, Judge Harold M. Stephens, Chief Justice of the United States Court of Appeals for the District of Columbia, together with all of the members of that court and of the United States District Court for the District of Columbia, also attended. Judge Bolitha J. Laws, Chief Justice of the United States District Court for the District of Columbia, presided. The courtroom was unable to hold the many friends of Judge Bastian. There was none present who seemed more pleased than Judge Bastian's mother, who occupied a seat on the front row.

The meeting of the committee to report on the desirability of purchasing Salisbury House in Des Moines for the headquarters of our Association was held in Des Moines on November 9. After a trip around Des Moines and lunch at the Wakonda Country Club, Salisbury House was carefully inspected from garret to basement. Carl Weeks, who built Salisbury House and now resides there, was host to a most excellent dinner served there. The committee met on two occasions, but deferred its final recommendation. It has called a meeting for Sunday, February 25, just preceding the Mid-Year Meeting of the House of Delegates.

The Board of Governors at its last meeting passed the following resolution, which I trust will be of interest to our members who are called to the Armed Services:

> RESOLVED, That members of the American Bar Association in good standing, and including members hereafter elected who shall have paid one year's full dues, shall upon written request have their dues remitted while in active service of the armed forces of the United States. The JOURNAL and Year Book shall be sent to such members only upon request.

I am writing this page the day before Thanksgiving. We would all do well to contemplate the many things for which we, as American lawyers, have to be thankful—that we are citizens of this great country where democracy is a reality, where free elections are truly free, where we may enjoy our freedom without fear, where we may be thankful for a united people. We have just reason to have confidence that our nation will successfully solve the problems faced by this generation, as difficult problems have been faced with courage by our ancestors. We should be proud that we belong to a great profession, truly American, and that we may practice before courts that are independent. The administration of justice was never higher in any land at any time than in our own today.

This is the Christmas issue of the JOURNAL. I wish every American lawyer a most happy Christmas and enjoyable holidays, spent in this prosperous land and with pleasant surroundings among our families and friends. May I suggest that one and all resolve that in the crucial period of 1951 we will realize not only our blessings, but our obligations as American citizens and lawyers and take a keen interest in all those matters affecting our Government and the welfare and happiness of our people.

AMERICAN BAR ASSOCIATION

Journal

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EDITORIAL OFFICE

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■ *The Struggle for Peace*

We Americans are prone to believe that our democratic way of life is inevitably foreordained. We like to think, perhaps too sentimentally sometimes, that the right and the truth will always prevail. Forgetting the lessons of history, we act on the assumption that our side shall win all future wars; that our democratic way of life, of course, will survive in a future holocaust of atomic war. Why? The ready answer is: because America is a democratic nation and on the side of peace.

What is "peace"?

Peace is not a heavenly state where all men are men of good will. Whatever it may be in Heaven, peace on earth is what men call a state of law and order. Unless laws are enforced, they are merely moral precepts or ideals. Unless laws are enforced, there is no order. In city, in state, in nation, enforcement of law finally rests in the hands of a policeman, a sheriff, a state guard, or an army. In brief, peace as we know it finally rests in the hands of a man with a gun who will use it when necessary to compel submission to law.

No system of law and order will long endure unless it also rests on other forms of force than that of armed might alone. The sword and the purse have been the traditional symbols of power. In a democratic world public opinion, founded on the moral sense of the community, is even more potent than tanks and guns and planes. It is the deeper moral convictions of men which determine the ultimate direction and the intensity of the use of military power. Man's sense of right, too, is might. America itself was founded by men who pledged and gave their lives to the ideals of liberty and democracy.

There are many millions of people on the earth to whom as yet democracy as a way of life means little or nothing. Some evil geniuses, like Hitler, would not choose democracy if they could. They have no intention of submitting their use of power to the veto of those whom they govern. Such leaders and their soldiers often hold fanatical beliefs which make them even more dangerous as enemies, as our recent experience in Korea has demonstrated.

Civil War veteran, Captain Holmes, wrote to his Oriental friend, Dr. Wu, "If the different desires of different people come into conflict in a region that each wishes to occupy (especially if it is a physical region) and each wishes it strongly enough, what is there to do except to remove the other if you can?" We want the *right* to prevail. How? Wishing will not make it so. In his first report on the Korean War to the United Nations, Supreme Commander General MacArthur pointed out that the initial advantage always lies with the aggressor, and that this, combined with his accumulated resources, gives "the enemy a strength that cannot be overcome until the United Nations forces achieve the effect of superiority in weapons and manpower". *Superior force wins*—that is the unavoidable lesson of military history.

The use of military force wins the support of the democratic world when it is employed to secure those ideals which men hold highest—honor, justice, and that freedom for man to be himself which we Americans call liberty. The United States is leading the fight for peace, for law and order in world affairs today. Side by side with other United Nations she is fighting to enforce peace in Korea. Law and order—peace—must be enforced. When that enforcement requires military action, some men will be killed in the fighting. That is the price of peace. Americans who give the last full measure of devotion to enforce law and order in the world today, can do so with the sacred conviction that their lives have been devoted worthily to the finest ideal men have ever died for—the ideal of liberty which America symbolizes to the world.

■ *A Nationally Administered Bar Examination*

In a stimulating and thoughtful article, which appears in this issue of the JOURNAL, Herbert W. Clark has laid before the profession for consideration and discussion the question whether we should not experiment with a nationally administered bar examination.

Mr. Clark, one of the earliest proponents of such an examination, states his case with cogency, and illustrates and supports his argument out of his experience as a former member and sometime chairman of the California committee of bar examiners and out of information acquired as a member of the Advisory and Editorial Committee on Bar Examinations and Admissions To Practice Law of the Survey of the Legal Profession. He

was also Chairman (1947-1949) of the Section of Legal Education of the American Bar Association and is currently a member of the Council of Legal Education and Admissions, and chairman of the Joint Committee named by the Council, the Association of American Law Schools, and National Conference of Bar Examiners to consider the project of a national bar examination.

No one is better qualified to deal with the subject, but it is not to be expected that there will be unanimous agreement with him either in detail or in general. Indeed, Mr. Clark is neither pontifical nor aggressive in presenting his views. He has endeavored to anticipate and answer objections but he admits there are difficulties for which he submits only tentative solutions.

One difficulty is the finding of money to finance the work. A subsidy from some source might be required in the early years but when once it gets well on its way the activity should be able to finance itself. The mechanical operation of the examination, Mr. Clark suggests, could be confided to the Educational Testing Service, of Princeton, New Jersey, which could protect the secrecy of the examinations and guard against discrimination of any kind. The preparation of questions of the essay type calls for a special skill possessed by few other than experienced law teachers, so the questions would probably have to come mostly from schoolmen under supervision of a national organization set up for the purpose. The physicians and the certified public accountants, as Mr. Clark points out, have a national examination supervised by such a national organization.

Probably the greatest difficulty is to satisfy the faculties of the law schools with respect to the subjects to be covered by a national bar examination. The schools wish, properly, to be free to teach a wide variety of subjects and give students latitude of election. Therefore the national examination should be confined to those twelve or thirteen subjects which are basic in the common law, are taught in every respectable law school, and in which all lawyers should be well grounded. Yet this must be done without canalizing to an objectionable degree curricula of certain of the schools which might be inclined to point all their teaching at the examination; a situation which would be bad for legal education if it extended to good schools which do not now tie their teaching to the local examination.

Still another matter of concern is the question whether in a national examination with thousands of papers to be marked a uniform standard of grading would be possible. If we bear in mind that the examination is a qualifying and not a competitive test, uniformity could be secured within satisfactory limits through a review, by a small and highly competent group of readers, of every paper which fell within a certain number of points on either side of the passing grade.

Whether disposed to concur in Mr. Clark's views or dissent, the reader will find the article to be interesting and provocative.

■ *Rare Statesmanship*

Governor Adlai E. Stevenson, of Illinois, whose address to the Section of Criminal Law appears elsewhere in this issue, gives an example of public service of which his fellow members of this Association may well take note.

One of the first reforms accomplished by his administration was the reorganization of the State Police to remove this arm from its former partisan political control. Faced with the breakdown of local law enforcement in some counties, he declared war upon organized commercialized crime, using the reorganized State Police to attack this cancerous growth with its attendant corruption of minor public officials. Such action is refreshing in a day when citizens are all too prone to regard the affiliation of crime and politics with either despair or cynical complacency.

The Governor has gone about his work in the conviction that "government should be as small in scope and local in character as possible". Here again is a refreshing note in times characterized by what he aptly calls a "growing and dangerous tendency to look to higher levels of government for the solution of problems that could and should be solved closer to home".

In what Governor Stevenson unassumingly says and does is apparent a fundamental belief in the importance of economy in government and the responsibility of citizenship. His type of statesmanship, which lawyers generally must approve, is all too rare in public life today.

■ *Pointed Brevity*

How few lawyers ever master the rarely learned lesson of pointed brevity. Brevity is the soul of effective advocacy. The presentation of a concise argument in a few terse words marks the master advocate. To put his position in a nutshell, to talk to the point, wins a welcome audience. The wise lawyer learns to omit. Judicious omission is preferable to superfluous detail. Undue specification is always risky. Yet nothing is too long if it is boiled down to its essence, if nothing more can be abstracted. Men are interested in your decisions, less in your reasons, hardly at all in your excuses. Other men think, too, so be prepared, be brief, be seated! The laconic Spartans were a model for lawyers. When Philip of Macedon wrote the Spartan magistrates, "If I enter Laconia, I will level Lacedaemon to the ground," the reply he got was one word, "If!"

Enough said!

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1951 Annual Meeting and ending at the adjournment of the 1954 Annual Meeting:

Arizona	Nebraska
Connecticut	New Jersey
District of Columbia	Oklahoma
Illinois	Puerto Rico
Iowa	South Carolina
Maine	South Dakota
Michigan	Texas
Mississippi	Washington
Montana	Wyoming

An election will be held in the State of Florida to fill the vacancy in the term expiring at the adjournment of the 1953 Annual Meeting. The State Delegate elected to fill the vacancy will take office immediately upon the certification of his election.

Nominating petitions for all State Delegates to be elected in 1951 must be filed with the Board of Elections not later than April 19, 1951. Petitions received too late for publication in the April JOURNAL (deadline for receipt March 5) cannot be published prior to distribution of ballots, fixed by the Board of Elections for April 27, 1951.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. April 19, 1951.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

BOARD OF ELECTIONS
Edward T. Fairchild, Chairman
William P. MacCracken, Jr.
Harold L. Reeve

"Books for Lawyers"

HUGO L. BLACK. A STUDY IN THE JUDICIAL PROCESS. *By Charlotte Williams. Baltimore: The Johns Hopkins Press, London: Oxford University Press. 1950. $3.50. Pages 208.*

The author has presented a creditable portrait of Mr. Justice Black, with sufficient background sketched in to furnish an explanation of his salient traits. Of paramount concern to lawyers is the Justice's economic, political, legal and moral philosophy, the impress of this upon his brethren, and above all his concept of the function of the Supreme Court of the United States. The position he has created for himself in the history of the Court is certainly unique. This book is therefore not only interesting but, through its distinct merit, important to lawyers.

The rise to eminence of Hugo Lafayette Black, son of an Alabama farmer and country merchant, is altogether in the American tradition. At the age of 24 he was a Birmingham Police Court Judge; in 1915, at the age of 29, he was elected to the important position of Prosecuting Attorney. He resigned to enter the Army when war was declared in 1917 and became a captain of Field Artillery. In 1926 he was elected to the United States Senate to succeed Oscar Underwood. In 1937 he became Mr. Justice Black of the Supreme Court, F. D. R.'s first appointee to the Court which he sought unsuccessfully to enlarge. The author states that "It could be said by a reasonably objective observer [such, incidentally, as was this reviewer, who had watched at close range Senator Black's stormy career in the Senate] that Justice Black's appointment placed upon the Supreme Court an alert and ambitious member of pronounced social, political and economic views, positive, uncompromising, and self-assured."

This small book has a chapter entitled, "The Senator from Alabama", and another entitled, "Lantern and Scourge", dealing with Senator Black's vigorous investigation of lobbying, in his role of Chairman of the Senate Committee; two chapters are devoted to the furor of criticism which resulted from Black's appointment to the Supreme Court. The remaining section reviews his record as a Justice, and these chapters give the book an unusual value for lawyers and for laymen as well.

From an intelligent analysis of Mr. Justice Black's opinions, for the most part his dissents, the author concludes that "the fountainhead of his political philosophy is a desire to improve the lot of the common man and protect him from the oppression of powerful forces". She demonstrates by means of many citations Mr. Justice Black's strong belief in the Bill of Rights and his zeal in protecting freedom of speech and of religion,—the latter notably in what is facetiously called the "Jehovah's Litigants" cases. To attain its ends, as the author observes, his philosophy seems to impel a certain rationalization in some of his opinions. He is for states' rights, when it is a matter of state taxation; but he holds that the delegation of power to Congress to regulate interstate commerce enables Congress to fix the minimum wages and maximum hours of a maintenance-employee in a building where several tenants are in intrastate commerce and one also engaged in interstate commerce. The author traces the Justice's obsession for the rights of the underdog to his experience as Police Court Judge when he began to understand the causes of the plight of many prisoners brought before him.

Of signal importance to members of the Bar and their clients is Black's conception of the function of the Supreme Court of the United States. The author declares that he undoubtedly conceives it to be but another instrument of democracy; and she quotes, on page 50, the following from Senator Black's speech made in support of F. D. R.'s Court Bill: "A majority of our judges should not amend our Constitution according to their economic predilections every time they decide a case." But the author summarizes the Justice's opinions thus: "Probably in the Court's whole history no member has shown less compunction than has Justice Black in departing from judicial precedent . . . he has gone to no pains to disguise the fact that he himself has positive ideas of rightness which he believes should be embodied in the law."

The incorporation of a judge's "ideas of rightness" in the law, although a long-established method by which the growth of the law keeps pace with progress, could at times easily have the effect of supplanting the law as established by a line of precedents and by Congress. This conception of a judge's function, if carried to considerable lengths, would distort the fabric of our economy, based as it is upon law; and lawyers, whose duty it is to interpret the law to their clients, would find themselves at a loss. Uncertainty and confusion would result throughout the nation. In conclusion, however, the author makes the prediction that "the influence of Justice Black's judicial philosophy upon the course of constitutional development may reasonably be expected to decline in the immediate future". Developments in the law made necessary by social change will remain subject to constitutional method.

As a final tribute to Mr. Justice Black the author declares that the record has now sufficiently unfolded to permit no doubt of his learning and ability, and that no one has ever questioned his intellectual energy.

CHARLTON OGBURN
New York, New York

MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION.

Edited by Arthur T. Vanderbilt. New York: The National Conference of Judicial Councils. 1949. $7.50. Pages xxxii, 752.

The genesis of this book is in the enlightened program for the improvement of judicial administration which was written in 1937-1938 when the author of the book was President of the American Bar Association, and his esteemed friend, Judge John J. Parker, was Chairman of the Association's Section of Judicial Administration. Spurred on by the vibrant leadership of those two jurists, the Section, in the Association year 1937-1938, wrote the most comprehensive program for the improvement of judicial administration that has ever been put forth. When the program had been written, the American Bar Association approved it and assumed the responsibility of commending it to all the states. In later years the Association added to the program two important chapters on: (1) higher standards of judicial selection, conduct and tenure, and (2) improvement of our lower courts, such as traffic and justice of the peace courts.

This volume accepts as the irreducible minimum for judicial administration the program just mentioned and having done so compares the judicial establishment in each of our forty-eight states with the irreducible minimum for the purpose of determining the extent to which the states conform to the requirements. The contrast is made, not by resort to opinion, newspaper articles or abstract statement, but by citation to statutes, judicial decisions, bar association reports and other authoritative material.

The term "judicial administration" scarcely suffices to indicate the wide range of subjects covered by the program. It includes such subjects as discovery, length of briefs, partial new trials, the value of oral argument, the evil of one-man decisions, compilation of judicial statistics, methods whereby states select their chief justice, and the procedure employed by state administrative agencies.

The introduction to the book makes this statement of its purpose: "This volume is tendered not as a literary effort but as an arsenal of facts." Notwithstanding that deprecatory reference to the diction in which the work is cast, the volume is a good illustration of the manner in which terse, laconic composition can cram between two covers a vast amount of facts, data, analysis and discussion. An extensive use of ingenious maps and illustrations renders easy an understanding of the data. Although every proponent of improved judicial administration will deem this treatise "an arsenal of facts", and turn to it for his armament before entering battle, yet others who are not reformers but are struggling with a problem of procedure will come to see that they can gain practical help by consulting this book. A knowledge of what is going on in other states and the manner in which it works sometimes is of assistance in solving a problem of practice or of construing a new rule. Then, too, when the practitioner lifts his vision above his state's limited horizon and views the judicial establishment of other states, he has taken a step which may change him ere long from a mere technician into a profound lawyer.

This treatise, in portraying the progress which the Association has achieved with its program for the betterment of judicial administration, unfolds a story of accomplishment which is reassuring and encouraging. The author of this book, in his introduction to the committee reports which later became the Association's program, said: "Some day —and, I hope, in the not too distant future—a more enlightened generation will look back on these reports and wonder that it should have been necessary to write them, necessary to agitate for the recommendations set forth in them, and necessary, perhaps, in some states to invoke the aid of enlightened and farseeing laymen to bring about their adoption." As shown by the author, the twelve years that have passed since those words were written have yielded substantial improvement to our judicial establishments in all of the states. Proving, in this instance, that a prophet is not without honor in his own country is the happy fact that New Jersey, which has made the author the Chief Justice of its Supreme Court, has adopted more of the program than any other state.

The volume includes as an appendix all of the original committee reports upon which the Association's program was predicated. The value of the work is enhanced by a wealth of citations to decisions, statutes, law review articles, bar association reports and material of such nature as the Knox Report, upon which the federal legislation controlling jury selection was based. The book by no means confines itself to placing before the reader a mass of data. It clarifies and segregates material. It enumerates the states, one by one, which employ a given rule of procedure or a modification or rejection thereof. The roll call of the forty-eight states upon the various subjects with which the treatise deals, together with citation to statutes, is an important feature. The writer has gone beyond what a reader might expect to find in a book of this kind. For instance, when he portrays rulemaking, he takes note of the principle which is likely to govern instances in which court-made rules conflict with legislation. And he not only reports upon power which the courts employ, but also, by citation to constitutional provisions, delves into the sources of judicial power which the courts neglect. The last fifty-nine pages of the volume are given over

to a splendid index.

Here is a book that richly deserved printing. Interest in the brilliant author of the book, if not in the subject of the improvement of judicial administration, will cause lawyers and judges everywhere to read the volume. None will be disappointed.

GEORGE ROSSMAN
Supreme Court of Oregon
Salem, Oregon

OUR MORE PERFECT UNION.

By Arthur N. Holcombe. Cambridge: Harvard University Press. 1950. $6.00. Pages xiii, 459.

Our More Perfect Union is a scholarly work dealing with American government under the Constitution. This critical essay on the Constitution of the United States discusses in an authoritative manner not only the theories of government and the conflict of interests that had to be reconciled in order to create our "more perfect union", but traces the history of that "great rehearsal" up to the present time. It discusses the vicissitudes of that monumental document framed by the Federal Convention of 1787 and admirably shows the reader what circumstances and factors have helped make that document the oldest written constitution in the world.

Professor Holcombe states frankly that the mere fact of survival is not necessarily a sign of merit in a constitution (page VI). Nevertheless, he is able to show how the document of 1789, which formed our "more perfect union", has been implemented to meet the needs of a great nation in a changing world.

Professor Holcombe soundly states that "government is more than an arrangement of the offices of the state for the service of the people. It is a means of adjusting the relations between the individual and the whole body of the people" (page VI). Concluding that there is an economic, social and cultural, as well as a political basis of a constitution, he proceeds to evaluate the three important principles of government which received their first systematic application in the Federal Convention. These three principles are federalism, the natural limits to the power of numerical majorities and separation of powers. These principles are interpreted in terms of modern problems of American government and are evaluated "under the strenuous conditions of the modern world" (page VIII).

This excellent study of American government interprets historical facts clearly and meaningfully. It shows not only how the product of the Federal Convention moulded American government, but also how the institutions that actually have developed in America, in turn, have moulded the minds of great Americans to give a new meaning and a new significance to the eighteenth-century document.

The book contains twelve chapters and discusses the political principles of the American federal union, the ordeal of the Constitution, the unplanned institution of organized partisanship, involving the perennial struggle between the "ins" and the "outs", the natural limits to partisan power, and gives an excellent account of the functions of the three branches of government. This latter discussion is somewhat different and considerably more palatable than that found in most treatises on American government.

Chapter VI discusses the majority rule in the House of Representatives. Professor Holcombe concludes that the record of legislative action in the House of Representatives supports the view of Madison who believed that "the natural limits to the power of numerical majorities in a country as large as the United States would afford some protection against the abuse of power under any system of majority rule in the popular branch of the Congress" (page 190). This, of course, is very interesting because the principle which was designed to serve the "more perfect union" at a time when it united less than four million persons and only thirteen states also has served well the Union of 150 million people and 48 states.

Chapter VII dealing with the role of the Senate in the legislative process shows how the Senate, regarded as an organ for the review of legislative measures initiated by the House "in order to protect the rights of the states, has not fulfilled the purposes of the framers of the Constitution" (page 218). The section on senatorial arrogation of legislative power is particularly enlightening. It shows how the practice of senatorial courtesy tends to strengthen the executive power of the Senate (page 222). Furthermore, by making the Senators more important party leaders their authority in dealing with the President is enhanced. The practice also has the effect of "strengthening their hands in dealing with the members of the House of Representatives" (page 223).

Chapter VIII dealing with Presidents and Congresses does not neglect the importance of party government in our system of government as it has developed in practice. Professor Holcombe believes that the place of responsible party government in national politics is an unsettled problem of the American constitutional system (page 252). He agrees with A. Lawrence Lowell, *Public Opinion and Popular Government* (1913), that the essential function of major parties is not so much in presenting alternative sides of public questions, but in presenting alternative candidates for public office. Although the emergence of political parties has greatly modified the system of checks and balances as originally conceived by the framers of the Constitution, the reader is told that "the actual working of the theory of the separation of powers has on the whole been better than the framers could have foreseen" (page 278).

By virtue of the importance of the section dealing with the special problem of presidential power over foreign relations, it seems that a somewhat more extensive treatment could have been accorded to this phase of American government. Surely the so-called "modern practice of embodying foreign policy in executive agreements instead of treaties" (page

281) would call for more than a cursory treatment. Although one cannot help but agree with Professor Holcombe that "in a democratic age the process of determining public policy in the field of foreign relations tends to become less rather than more democratic" (page 282), the reader may well be deemed justified in his expectation of a more complete treatment of this important problem. The conclusion that the solution is in the direction indicated by the United Nations Participation Act of 1945 (page 283) is of too general a character to be of value to the exacting mind of the student of political science.

Chapters IX through XI, dealing with judges and legislators, judges and administrators and the Supreme Court and the states, will be appreciated and read with great interest by both judge and lawyer. In these chapters the reader will find a superb treatment of the struggle for judicial supremacy, a comparison of the Jeffersonian theory with the Hamiltonian theory of judicial power, and a remarkably accurate summation of the holdings of some of the leading constitutional law cases. The layman will read with keen interest the discussion of some of the sensational and historically important cases that have been decided by the Supreme Court of the United States.

The concluding chapter, ambitiously entitled "To Perfect a More Perfect Union" involves a critique of Madison's three principles of government. The experience of the American people confirms the belief of most of the framers of the Constitution that those who possess power are prone to abuse it. Professor Holcombe states the matter in the following way (page 396): "Men in power press on until they reach the limit of their power. This seems to have been as true of Americans under the Federal Constitution as of other men."

The author states that "though the federal government has become far more active and energetic in modern times than could have been anticipated by the framers, the balance of the federal system has not been thereby destroyed. The state governments also have become more active and energetic than could have been anticipated by the framers" (page 397). He concludes that it is plainly too soon to speak of the obsolescence of federalism (page 398).

Professor Holcombe is to be commended for this meaningful history of American governmental theory and practice. However, one perhaps disappointing feature should be mentioned. Professor Holcombe entitled his very first section interrogatively "Prelude to World Federation?" By expressions such as "a universal reign of law" and "since under changed conditions of modern times a world without a world government is also an awful spectacle" (page 1), his reader may be led to believe that the basic theme of the book is that the government established by the framers of the Constitution could be implemented as the basis for a world federation. The reader may believe that he is about to read a book that also will undertake to evaluate the international organization established by the United Nations Charter and probably receive suggestions for the establishment of a world government or world federation. Actually such is not the fact. The references to international organization and the international community are general and scattered, and no systematic treatment of world government is offered. However, the fact of the matter may very well be that Professor Holcombe simply wished to show that, in the language of Hamilton, the question still remains "whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their political constitutions on accident and force" (page 2, *The Federalist No. 1*). Professor Holcombe encouragingly asserts that the Federal Constitution "was a great achievement of rational reflection and deliberate choice, and rightly encourages the belief that mankind is not destined to depend forever for a solution of the problem of world government upon either accident or force" (page 3).

Our More Perfect Union uplifts the heart and mind of man by strengthening his belief that the planning of a more perfect international union is neither an impossibility nor destined to depend on accident or force. Many readers will hope that Professor Holcombe is right in his conclusion that the principles of government found to be sound by American experience, "if employed by statesmen of conciliatory dispositions and moderate tempers following the methods of 1787", can furnish a foundation for a world federal union.

EDWARD D. RE

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GEOGRAPHIC PRICING PRACTICES (BASING-POINT SELLING). *By William Simon. Chicago: Callaghan & Company. 1950. $9.00. Pages 381.*

The lawyer confronted with an "unfair practice" or "price discrimination" case arising out of his client's pricing methods, or called upon for a precautionary review of such methods, will find in this book an invaluable compilation and discussion with liberal excerpts from all the available source material, both legal and economic, on all sides of the many phases of this problem. Much of this material is not otherwise readily available or is difficult to locate and trace, even where there is access to adequate library facilities. The lawyer who has not had occasion to follow closely the recent developments in this field will find within the 381 pages of this book a comprehensive analysis of the pertinent material designed to give an understanding of the subject and a basis for the solution of pricing problems. While the author does not hesitate to venture his own opinions on controversial matters, he fully and fairly sets forth the views of the opposition and points out their pitfalls. Economists and businessmen interested in or

responsible for pricing policies will also find much of value in this book.

Although the author deplores the use of the term "basing point" he finds its use necessary in the title for public identification of the subject matter. Mr. Simon states: "There is disagreement concerning the source of confusion over the legality of many geographic pricing practices. But there is no disagreement that there is extensive confusion over the validity of virtually every pricing practice by which goods are now sold in interstate commerce in the United States." He then analyzes and attempts, so far as the state of the law permits, to dispel this confusion.

He further says: "Lawyers thoroughly familiar with this problem have frequently said that the only pricing practice which a seller may adopt with assurance of its legality is an independently reached uniform f.o.b. mill price." Since few businesses can profitably operate on such a price he carefully evaluates the business risks incurred in other types of geographic pricing and arrives at the heartening conclusion that "the sun now shines on *competitive* geographic pricing practices which are free of conspiracy".

The author finds somewhat of a paradox in the Federal Trade Commission enforcement policies. Geographic pricing is customarily attacked by the Commission under Section 5 of the Federal Trade Commission Act (as an unfair practice) and simultaneously under Section 2 of the Clayton Act as amended by the Robinson-Patman Act (as a price discrimination). Under the Section 5 count, the great danger is that a uniformity or rigidity of the price structure will be held to indicate conspiracy and therefore illegality, while under the price discrimination count a flexibility in pricing invites the charge of discrimination between competing customers of the seller.

The book is divided into eight chapters, the first four of which deal largely with the historical and economic background.

Chapter I introduces the reader to the technical and legal jargon involved, *i.e.*, uniform f.o.b. mill, delivered cost, mill net return, single and multiple basing points, phantom freight, freight absorption, equalization and allowance, delivered prices, uniform delivered prices, uniform zone prices, and conspiratorial or collusive prices.

Chapter II canvasses the economic arguments for and against required f.o.b. mill selling.

Chapter III traces the origin and history of the Federal Trade Commission's attack upon geographic pricing.

Chapter IV treats of the distinction between protecting competition and protecting individual competitors, with the consequent conflict between the Sherman Act policy commanding "hard competition" and the Robinson-Patman Act philosophy of "soft competition". This is emphasized by the Supreme Court's adoption in the Morton Salt case of the Commission's position that statutory injury under the Robinson-Patman Act occurs when different prices are given to customers of the seller in competition with each other regardless of the general effect upon competition. The author has recently argued this distinction, as *amicus curiae*, on behalf of several jobber organizations, before the Supreme Court in the Standard Oil Detroit jobber case (173 F. (2d) 210, *cert. granted*, 338 U.S. 865, *ordered reargued*, 339 U.S. 975), presently pending for decision.

Chapter V deals with competitive pricing legislation in the Congress. This is a particularly authoritative and valuable treatment inasmuch as Mr. Simon was General Counsel for the Senate Interstate and Foreign Commerce Committee, first under the chairmanship of Senator Capehart, when a congressional study of the problem was invited following the Supreme Court decision in the Cement Institute case, and later under the chairmanship of Senator Johnson (of Colorado) when bills on the subject were favorably reported and a comprehensive report on FTC pricing policies was filed. The congressional proceedings are fully covered. These include thirteen days of debate in the Senate and House, thirty days of committee hearings and the testimony of some 176 witnesses. Excerpts of the more important statements, committee reports, etc., are set forth with authoritative references. Mr. Simon's active participation throughout the congressional process has given him an excellent opportunity to evaluate the conflicting pressures and points of view. Since the attempted clarification by legislation failed because of a presidential veto, the maze of congressional material, carefully analyzed and explained, will be of inestimable value to anyone faced with geographic pricing policies and interested in knowing the pricing climate of the Federal Trade Commission, the Justice Department and the Congress.

Chapter VI covers the legality of geographic pricing under Section 5 of the Federal Trade Commission Act, while Chapter VII discusses this problem under the Robinson-Patman Act. In these chapters the author analyzes all the Commission and the Court cases as well as the current and seemingly conflicting policy pronouncements of the Commission. The four Supreme Court cases dealing with geographic pricing (Corn Products, Staley, Cement Institute and Rigid Steel Conduit) are carefully analyzed, with numerous references to the position of counsel as disclosed from filed briefs, where informative. Much of the confusion, the author points out, arises not from the direct holdings but from the implications in the dicta. He sees no danger to nonconspiratorial geographic pricing in the holdings themselves.

In Chapter VIII the author discusses the position recently taken by the Federal Trade Commission before the Supreme Court in the Standard Oil case, that the good faith meeting of a competitor's equally low price is not a full defense to a price discrimination charge. At first

blush this aspect may seem outside the scope of the title. However, in every geographic pricing structure where price variation is attacked as price discrimination, the good faith defense is a likely cornerstone of a successful defense—even though such defense is not confined to geographic price discrimination cases. Competitive geographic pricing is really just one form of good faith meeting of a competitor's equally low price.

BENJAMIN WHAM
Chicago, Illinois

A PRACTICAL MANUAL OF STANDARD LEGAL CITATIONS, *By Miles O. Price, New York: Oceana Publications. 1950. $2.00. Pages 106.*

Miles O. Price, librarian of Columbia University Law Library, has accomplished in his manual the herculean task of compiling the best and most preferred examples of legal citations.

The heretofore recognized authority for correct citation, "A Uniform System of Citation, Form of Citation and Abbreviations", originally produced in 1939 as a joint publication of the law reviews of Harvard, Columbia, Pennsylvania and Yale, now in its eighth edition, was written primarily for the law review editor. Here, for the first time, is the citation manual for the lawyer.

Mr. Price, in his preface, states:

"A legal citation has only one purpose: to lead its reader to the work cited, and this without enforced recourse to any other source of information, for data which should have been given in the citation itself. Let it achieve that aim and it is a good citation, although inartificially formed; failure to do so makes it a bad one, though beautiful to look at."

In the pages that follow, Mr. Price has attempted and succeeded in setting forth rules for and examples of legal citation which aid in accomplishing this primary purpose of the legal citation. Adherence to the offered suggestions will enable the busy practitioner at once to combine utility with good form which makes for a brief sparkling with legal clarity.

The first section of the manual is devoted to statutory material, and includes the preferred forms for citing congressional bills, hearings, committee reports, debates and proceedings. Also included are the forms for citing section and chapter designations of the various federal statutes, the Constitution, slip laws and statutes at large. Especially important to the practitioner today, in view of the intricate taxation and rent control rules and regulations, is the subsection on the correct citing of administrative rules and regulations.

The citations of federal statutes are paralleled by the subsection on state legislative and statutory citations. Included in this subsection is a very valuable "Table of State Statute Citations", setting forth the correct form to be used in citing the session laws and statutes of each state and territory.

The next major section is one devoted to case material. Here the author goes into great detail in illustrating the preferred form of citation of every type of case, in both state and federal courts. Included in the discussion of case material is the most important subject of punctuation in case citation; such significant but little used words as *contra* (a holding squarely opposite), *accord* (a holding substantially in point), *see* (dictum), *but see* (dictum *contra);* and many other short cuts to correct legal citing. Also included is the all-important topic of the order of citing cases, and the correct manner of repeating citations, both in the main body and in footnotes.

The section on "Federal Administration Agency Rules" is particularly valuable and provides the lawyer with a source of material never before available in printed form. Accomplishing a most difficult task, Mr. Price sets forth agency rulings as cited by the agencies themselves; patent and trademark citations; and patent, customs and tax court decisions, among others.

The method of correctly citing the increasingly important law services is explained in a separate section. Following this is an invaluable detailed section on "Treatises, Reports and Periodicals".

There are many other interesting and instructive sections in this unique manual. The important but confusing topic "quotations in briefs" is made crystal clear by the author. Also explained are indices to briefs, use of capitals, and the correct use of abbreviations and typography, including the refinements of type style.

The user will find this a handy pamphlet to consult in the preparation of briefs and memoranda of law. It can properly be called a "bible of legal citations". Use of the manual will avoid omission of vital information required to produce the perfect citation.

The present-day lawyer, with his varied practice, must not be without a guide to legal citation. In the reviewer's opinion, Mr. Price's manual completely fills that need. Written in outline form in simple index style —yet in detail where needed—it is a most valuable asset to the law library.

ARTHUR I. WINARD
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EVALUATION OF INDUSTRIAL DISABILITY. *Prepared by the Committee for Standardization of Joint Measurements in Industrial Injury Cases of the California Medical Association and Industrial Accident Commission, State of California. By Packard Thurber, Sr., M. D., Chairman. New York: Oxford University Press. 1950. $4.00. Pages v, 89.*

All of the forty-eight states now have workmen's compensation laws. It is not enough in any of the states that a workman merely prove a personal injury arising out of and in the course of the employment. In addition he must prove disability as set forth in the particular workmen's compensation statute.

Disabilities are of many kinds, and nation-wide include usually the following:

(1) Temporary disability. This is

usually either a total disability or a partial disability, and is best illustrated by the usual back strain which disables a man either totally or partially for a period of time followed by complete recovery.

(2) Permanent disability. The loss by amputation of one or more fingers or joints of fingers is usually considered a permanent partial disability; whereas the loss of both legs, for example, would be considered permanent total disability. There are gradations between.

(3) Disfigurement compensation. This is illustrated by scars on the face following burns or the tearing off of the scalp or disfigurement of the body in general.

(4) Loss of bodily function. This usually refers to the loss of taste, smell, or the power to have sexual relations, etc.

(5) Specific or schedule compensation. In most states this is illustrated by the loss of hands or parts thereof, either by amputation or loss of use, and similar losses of the foot or toes or eyesight.

The above statement is rather an oversimplification of an involved problem, because no two states have the same provisions as to disability. Only about thirty-two out of forty-eight make provision for disfigurement. Only a few make provision for functional loss of the types set forth above and even where disfigurement and functional loss are provided, some limit disfigurement to disfigurement of the head rather than of the body as a whole; others include in functional losses not only loss of the senses, such as taste, but loss of joint function.

So, too, for temporary and permanent disabilities there is sharp conflict as to the weekly amounts allowed, the factual and legal method of determining disabilities and in the method of compensating for these disabilities.

In addition, most states have some method of allowing definite sums for specific losses, such as the loss by amputation or loss of use of legs or parts thereof, arms or parts thereof, and eyesight. Others even add loss of hearing, the ears and other parts of the body.

States do not agree even on the nomenclature. In most states such losses are regarded as specific or schedule losses; others call them permanent partial disability, and compensate for them by a stated amount regardless of whether or not the employee is disabled for work. In Massachusetts, for example, a worker receives $3000 for the loss of the right arm at the shoulder regardless of whether or not he goes back to work; but this is in addition to his weekly compensation which is $30 maximum a week for a single man, and $2.50 extra for each of his children and $2.50 for a wife, for the entire period that he is unable to work. A great majority of states, however, give a man temporary total disability while he is laid up and the stump is healing, and then give him a definite number of weeks for the loss of the arm at the shoulder.

The above illustrates the difficulty in understanding the over-all picture as to disability. In addition, California has the special problem of making awards for restriction of joint motion.

As stated in the foreword of this book:—"The determination of restriction of joint motion in the past has been accomplished by several different methods, all of which have served their particular purpose, although, owing to the lack of uniformity, confusion, delay, and inconvenience to all parties concerned have been the result. Thus, it is recognized as essential that the Industrial Accident Commissions have uniform reports based upon a standard procedure. Therefore the Council of the California Medical Association, at their annual meeting in San Francisco in May 1948, authorized the chairman of their standing committee on industrial practice to appoint Dr. Packard Thurber, Sr., chairman of a sub-committee for the standardization of joint measurements in industrial injury cases."

The book then proceeds by illustrations to show doctors, claimsmen, lawyers and all others engaged in workmen's compensation practice in California, the proper methods of reporting the restriction of joint motion throughout the body. The book deals in detail with the neck, the spine, the upper extremity, the lower extremity, and special disabilities. It does an excellent job not only in its illustrations but in nomenclature. Lawyers and laymen by looking at page 47 can easily understand, for example, what the words "axis of proximal phalanx" and "axis of 1st metacarpal" mean.

The book has been endorsed by the Industrial Accident Commission of California and therefore presumably all examining industrial physicians will be required to use the standardized methods of examination and reporting contained in the book, in all industrial cases.

From the writer's years of experience with doctors, he ventures to say that it will not eliminate all the problems involved, but it will lead to greater standardization, and in some measure clear up "delays, conflicts and confusion incidental to miscellaneous unintegrated methods of measuring and evaluating measurement of joint function".

The value of the book, however, will be limited largely to California, and is restricted, as the small volume openly admits, to one problem in the whole field of disability, to wit, the restriction of joint motion. For that limited problem it is an excellent book.

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CHARACTER ASSASSINATION. *By Jerome Davis, with introduction by Robert Maynard Hutchins. New York: Philosophical Library. 1950. $3.00. Pages 259.*

Character Assassination is a vigorous attack on the prejudice, bigotry, and hysteria that tend to corrode the basic freedoms on which American democracy rests. The author deals with the "witch hunts" of colonial times, the vilifications to which Washington, Lincoln and Franklin D. Roosevelt were often subjected,

the hostility and discrimination against minority groups such as the Jews and the Negroes, and the attacks against the trade unions. The latter portion of the book is devoted to the modern "witch hunts" typified by political and notoriety-seeking investigations and reckless and unfounded charges against public officials.

There is little in the book that is not already known to readers of the daily press and to those who have some acquaintance with American history. Yet Dr. Davis' compilation of case after case emphasizes the serious danger of tendencies which he believes are presently leading toward a form of thought control in this country. He clearly demonstrates that the easy process of disposing of a contrary view simply by applying some such term as "communist" to it involves the negation of thought of any kind.

The book makes no pretense of being a scholarly and scientific treatment of public hysteria and prejudice. Dr. Davis is pleading for a cause in which he believes. As a result, his work, as any pleading, lacks objectivity in places and leans toward a selection and emphasis on cases that are favorable to the pleader's cause. Thus no mention is made of the irresponsible attacks which have also occurred against the more conservative groups and organizations with which the author is not in sympathy. And, while Dr. Davis urges that we lean over backwards to assist Russia in rebuilding her war-shattered country, he says nothing of the vitriolic character assassination practiced by the American Communists. Nor do the facts always justify his general conclusions. For example, he charges the House Un-American Activities Committee with "promoting hysteria which may well cost America billions of dollars in unnecessary military expenditures". Critical as we may be of the operations of this committee, we can hardly accuse it of promoting hysteria in this respect. If there was hysteria in armament expenditures —and the facts indicate quite the contrary—it was brought about by far more potent influences than the Un-American Activities Committee.

But these criticisms are apart from the main theme of the book. Whether or not we agree with the author's views or judgments in individual instances, *Character Assassination* serves as a timely reminder of the harm that public hysteria has caused in the past, and of the discrimination and prejudices that still exist in large segments of our society. It furthermore stands as a warning that in fighting for the democratic way of life, we do not resort to the same tactics that we so violently abhor in our opponents. Guilt by association, vilification, wild and reckless charges against the good faith of public officials, irresponsible attacks against the character of people who do not believe as we do—all of these methods are alien to Anglo-American tradition. No group of men and women should be more aware of this fact than those trained in the law.

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Recent Books

THE CASE OF JOHN C. WATROUS. By Wallace Hawkins. Dallas: The University Press in Dallas. 1950. $5.00. Pages 109.

A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN-AMERICAN LAW. By Phanor J. Eder. New York: New York University Press. 1950. $6.00. Pages 257.

THE EPIC OF KOREA. By A. Wigfall Green. Washington, D. C.: Public Affairs Press. 1950. $2.50. Pages 136.

ESSAYS ON FEDERAL REORGANIZATION. By Herbert Emmerich. University, Ala.: University of Alabama Press. 1950. $2.50. Pages xii, 159.

JOHN ADAMS AND THE AMERICAN REVOLUTION. By Catherine Drinker Bowen. Boston: Little, Brown and Company. 1950. $5.00. Pages xvii, 699.

JUSTICE IN RUSSIA. By Harold J. Berman. Cambridge, Mass.: Harvard University Press. 1950. $4.75. Pages 322.

THE LAW OF CADAVERS. Second Edition. By Percival E. Jackson. New York: Prentice-Hall, Inc. 1950. $12.50. Pages lxxxiii, 734.

MANUAL OF PREVENTIVE LAW. By Louis M. Brown. New York: Prentice-Hall, Inc. 1950. $5.00. Pages 346.

OUR REJECTED CHILDREN. By Albert Deutsch. Boston: Little, Brown and Company. 1950. $3.00. Pages xxii, 292.

THE PAPERS OF THOMAS JEFFERSON, VOLUME II—1777 TO 18 JUNE 1779, New Jersey: Princeton University Press. 1950. $10.00. Pages xxiii, 664.

A PLAN FOR PEACE. By Grenville Clark. New York: Harper & Brothers. 1950. $1.00. Pages x, 81.

POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY. By Harold D. Lasswell and Abraham Kaplan. New Haven, Conn.: Yale University Press. 1950. $4.00. Pages xxiv, 295.

PRIMER OF PROCEDURE. By Delmar Karlen. Madison, Wis.: Campus Publishing Company. 1950. Pages 525.

SECURITY, LOYALTY AND SCIENCE. By Professor Walter Gellhorn. New York: Cornell University Press. 1950. $3.00. Pages viii, 297.

SELF-INCRIMINATION. By Fred E. Inbau. Springfield, Ill.: Charles C. Thomas. 1950. $2.50. Pages 91.

TIME TO UNDERSTAND. By Emanuel R. Posnack. New York: Greenberg Publishing Company. $2.50. Pages ix, 181.

TWELVE AGAINST CRIME. By Edward D. Radin. New York: G. P. Putnam's Sons. 1950. $3.00. Pages 242.

UNIFORM CODE OF MILITARY JUSTICE. By Frederick Bernays Wiener. Washington, D. C.: Combat Forces Press. 1950. $3.50. Pages 275.

UNRAVELING JUVENILE DELINQUENCY. By Sheldon and Eleanor Glueck. New York: The Commonwealth Fund. 1950. $5.00. Pages xv, 399.

THE VELPKE TRIAL. Edited by George Brand. London: William Hodge and Company, Limited. 1950. $4.25. Pages 356.

Courts, Departments and Agencies

E. J. Dimock • EDITOR-IN-CHARGE Lydia A. G. Stratton • ASSISTANT

Aliens . . . Internal Security Act of 1950 . . . petition to stay deportation pending determination of petition for naturalization denied since Act precludes naturalization of persons who have been ordered deported.

■ *U.S. ex rel. Jankowski* v. *Shaughnessy*, U.S.D.C., S.D. N.Y., October 13, 1950, Ryan, D.J.

Petitioner had filed a petition for naturalization under §325 of the Nationality Act which, at the time of the filing, permitted the naturalization of seamen who had served on American vessels for five years immediately preceding the date of the petition. Thereafter deportation proceedings were started against him charging illegal entry and his deportation was ordered. The present court had before it a writ of habeas corpus whereby petitioner sought to stay his deportation until final determination of his pending petition for naturalization. Judge Ryan stated: "Prior to the passage of the Internal Security Act of 1950, (amending Section 329 of the Nationality Act of 1940, 8 USCA 729; enacted by Congress on September 23, 1950), this court would have granted [petitioner's] request in view of the *Walther* decision in this circuit. 175 F. 2d 693, C.A. 2. However, in Section 27 of the Internal Security Act of 1950, enacted as a new subsection (c) to Section 329 of the Nationality Act of 1940, the following explicit language appears: 'No person shall be naturalized against whom there is outstanding a final finding of deportability, and no petition for naturalization shall be finally heard by a naturalization court if there is pending against the petitioner a deportation proceeding pursuant to a warrant of arrest issued under the provisions of this or any other act.' This language, which seems perfectly clear and unambiguous on the precise point raised in this proceeding, appears to preclude the court's giving [petitioner] the relief he seeks." He held that, even though petitioner fell within the category of persons who were eligible for naturalization without having entered the United States lawfully for permanent residence, Congress had, in §27, recognized the possibility that an individual might at the same time be eligible for naturalization and subject to deportation and had chosen to prohibit the naturalization of an alien against whom deportation proceedings had been commenced or a final finding of deportability had been made. The petition was dismissed.

Bankruptcy . . . sales by trustee . . . unconditional bid to purchase realty accepted by trustee may be withdrawn prior to reorganization court's confirmation of sale.

■ *In re Susquehanna Chemical Corp.*, U.S.D.C., W.D.Pa., September 28, 1950, Courley, D.J. (Digested in 19 U.S. Law Week 2143, October 10, 1950).

"The question presented to the Court in this reorganization proceeding was whether bids to purchase real estate might be withdrawn prior to their approval and confirmation by the court. The bids were unconditional with the payment of hand money and had been firmly accepted by the trustees. Terming the problem "novel" the court said that in a sale to one by a trustee in bankruptcy, the court is held to be the real seller and bids made the day of sale may be approved despite the acceptance of previous bids by the trustee, and held that, until approved by the court, the bids here were tentative. In its opinion, a contrary holding would prove "inimical" to the interests of the creditors. It was ordered that the bidders should bear the cost and expense of the proceeding and any other expenses which the trustees had incurred incident thereto.

Commerce . . . state regulation . . . state may require interstate natural gas pipe-line company to obtain certificate of public convenience and necessity prior to selling gas direct to local consumers in municipalities already served by another company.

■ *Panhandle Eastern Pipe Line Co.* v. *Michigan Public Service Comm.*, Mich. Supreme Court, October 10, 1950, Boyles, C.J. (Digested in 19 U.S. Law Week 2157, October 17, 1950).

The Panhandle Eastern Pipe Line Co. (hereinafter called the interstate company), an interstate natural gas pipe-line company subject to regulation by the Federal Power Commission under the Federal Natural Gas Act (15 USC §717 *et seq.*), sought to enjoin the enforcement of an order of the Michigan Public Service Commission (hereinafter called the state commission) directing it to cease and desist from making direct sales and deliveries of natural gas to industries within the state and located within municipalities already served by a public utility, until it had obtained a certificate of public convenience and necessity from the state commission. The action was before the state Su-

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EDITOR'S NOTE: The omission of a citation to United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

preme Court on appeal from a judgment below granting the injunction. The injunction was issued and the appeal was taken prior to the United States Supreme Court's decision in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana* (332 U.S. 507; 34 A.B.A.J. 150, February, 1948). On the basis of that decision, the interstate company conceded that the Federal Natural Gas Act had not occupied the field of sales of natural gas transported in interstate commerce direct to consumers for their own consumption but it claimed the right to make such sales subject only to the state's regulation of rates and services and without any express authority, certificate or approval from the state commission except as to rates and services. Pointing out that sales without a certificate in a municipality where another utility is rendering the same service would be in violation of state law and that approval of rates and services by the state commission in the absence of a certificate was expressly prohibited by that law, the Court expressed its decision as follows: "If [the interstate company] is free to compete at will for such local markets, and take the cream of the business, any other utility providing the same service in the same area might be forced to obtain higher rates for its services when it must obtain its natural gas from [the interstate company], and thus would face a distinct disadvantage. . . . The Panhandle-Indiana Case controls decision here. The right to sell natural gas in this state by [the interstate company] direct to consumers for their own use and not for resale, in a municipality where another public utility is rendering the same sort of service, is within the jurisdiction of the Michigan public service commission. Any other conclusion would allow [the interstate company] to engage in such business without either Federal or State control over the right to engage in such services. As a prerequisite to engaging in the business over which the Federal power commission has authority to control, [the interstate company] must obtain a certificate from that commission. As a prerequisite to engaging in that part of such business in this State over which the Congress has expressly relinquished control, the State regulatory commission has a like power. It has long been the general policy of the law that a public utility should be subjected to governmental control."

Judge Dethmers, dissenting, was of the opinion that the Panhandle-Indiana case held: (1) that the sales were in interstate commerce, (2) that, as such, they were subject to state regulations as to rates and services, and (3) that the orders of the Indiana commission requiring the interstate company to file tariffs, rules and regulations, annual reports, etc., were valid and permissible initial steps in the state's application of its regulatory plan to the interstate company. However, he did not agree with the majority that the case was controlling in the present instance. In his opinion, the present was a "plain case of the commission asserting the power to prohibit these sales in interstate commerce if they compete with the sales and business of local utilities" which was not permissible under the commerce clause (U.S. Constitution, Art. 1, §8). Judges Reid and Carr joined in the dissent.

Constitutional Law . . . personal, civil and political rights . . . New Jersey statute requiring daily reading from Old Testament and permitting recital of Lord's Prayer in public schools held not to violate First and Fourteenth Amendments.

■ *Doremus and Klein* v. *Board of Education*, N. J. Supreme Ct., October 17, 1950, Case, J.

In this action, the New Jersey Supreme Court affirmed a lower court decision upholding the constitutionality of a state statute which required the daily reading, without comment, of five verses of the Old Testament in the public schools and prohibited all religious services and exercises in state-supported schools "except the reading of the Bible and the repeating of the Lord's Prayer". Plaintiffs, both describing themselves as citizens and taxpayers and one as a parent of a child attending a state school, contended that the statute violated the First and Fourteenth Amendments of the United States Constitution since the reading of the Bible and the reciting of the Lord's Prayer were religious services, religious exercises and religious instruction and were of themselves in aid of one or more religions and in preference of one religion over another. They cited *Everson* v. *Board of Education* (330 U.S. 1, 33 A.B.A.J. 492) and *McCollum* v. *Board of Education* (333 U.S. 203, 34 A.B.A.J. 318) to support their contention. The Court did not agree but was of the opinion that the Old Testament and Lord's Prayer were nonsectarian, that the reading thereof did not constitute sectarian instruction or worship, that the First and Fourteenth Amendments did not, and were not intended to, prevent the Government's acknowledgement of a Supreme Being, and that the holdings in the *Everson* and *McCollum* cases involved essential elements wholly lacking in this instance and reasoning which did not reach the facts of this case. It noted that defendant had issued a directive permitting students to be excused upon request during the reading of the Bible. The Court said: "While it is necessary that there be a separation between church and state, it is not necessary that the state should be stripped of religious sentiment. . . . It may be of the highest importance to the nation that the people remain theistic, not that one or another sect or denomination may survive, but that belief in God shall abide. It was, we are led to believe, to that end that the statute was enacted; so that at the beginning of the day the children should pause to hear a few words from the wisdom of the ages and to bow the head in humility before the Supreme Power. No rites, no ceremony, no doctrinal teaching; just a brief moment with eternity. Great results follow from elements which to human perception are small . . .".

Constitutional Law . . . personal, civil and political rights . . . differences between North Carolina's law schools for Negroes and whites held equalized by advantages Negroes enjoy at Negro law school so that exclusion of Negroes from school for whites justified. ■ *Epps et al.* v. *Carmichael et al.*, U. S. D. C., M. D. N. C., October 9, 1950, Hayes, D. J.

Plaintiffs, who possessed the requisite academic requirements for admission to the University of North Carolina Law School (hereinafter called the University) where they applied for admission, sought an injunction against defendants for refusing to admit them to the University because of their race and color and because the state had provided a law school for Negroes at the North Carolina College (hereinafter called the College) where they had applied and been admitted as law students. The Court made the following findings: the University had an enrollment of 280 and a faculty of 10; the college had a well qualified faculty and 28 students; the housing facilities of both were inadequate, but funds had been appropriated and plans were being executed for changes, upon completion of which facilities at each would be substantially equal for the number of students likely to attend the institutions; at present, the facilities at the University were severely overcrowded and some classes were as large as 120, whereas the classrooms at the College were capable of accommodating more students than the school had, although the building was a wooden structure; the library at the University contained approximately 64,000 volumes, two-thirds of which were not available for use and many were duplicate sets; the library of the College contained 30,000 volumes and a variety of books which made it a "first-rate library"; the University had a law review and a chapter of the Order of the Coif whereas the College had neither; both conferred the LL.B. degree but the University also conferred the S.J.D. degree; both were approved by the American Bar Association; the University was approved by the Association of American Law Schools and the College had applied for admission to that Association which would likely be given in the immediate future; both were approved by the State Board of Examiners. Many persons qualified in the field of legal education testified in the proceeding, including counsel for the American Bar Association's Section of Legal Education.

Holding that, although there were certain differences in the facilities existing at the two schools, such disparities were overcome or equalized by advantages which plaintiffs would enjoy at the College, Judge Hayes said: "The evidence disclosed that the Negro lawyers of the state derive their practice from members of their race and there was no evidence to show that any member of their race ever represented a white client. In the opinion of some of the witnesses the advantages which the plaintiffs would derive from attending the College Law School, by reason of their contacts and acquaintances of the members of their race attending the North Carolina College from all parts of the state, would far exceed any advantages which might accrue to them if they attended the Law School at the University of North Carolina. It also appears that they are receiving individual attention and instruction as students at the College Law School and that it is an efficient Law School; staffed by an efficient faculty, with an excellent library and that the work of the Law School is not one of anticipation but it is securely established and has been in operation for ten years. The situation with regard to legal training offered to Negroes in North Carolina is quite different from the conditions which prevailed in the Texas case (Sweatt v. Painter, 339 U. S. 629), the Oklahoma case (Sipuel v. Board of Regents, 332 U. S. 631 [See 33 A.B.A.J. 722, 34 A.B.A.J. 64, 241; July, 1947, January, March, 1948]) or the Missouri case (Missouri ex rel. Gaines v. Canada, 305 U. S. 337). Following the Gaines case the Legislature of North Carolina established the College School without a law suit or the threat of a law suit, and it has proceeded with the development of the school of law with the fixed purpose to provide equal facilities for the Negroes with those furnished to the White students at the University of North Carolina." The Court pointed out that the strongest evidence supporting plaintiffs' contention was the smallness of the College's student body but that there was testimony that, if plaintiffs prevailed, approximately one half of the students at the College would attend the University, that there was ample testimony to show that the College's faculty was thoroughly capable and that its teaching kept pace with the work done at the University and other law schools of the state, that its applicants for admission to the Bar were as successful in proportion to their number as those from the University and other state law schools, and that there was no evidence that a Negro lawyer attending the University would enjoy a higher standing with the judges, lawyers, litigants, jurors and witnesses than he would enjoy if he attended the College. Judge Hayes further stated: "It is the view of the plaintiffs' expert witnesses that there can be no equality of opportunity if segregation exists. This opinion is contradicted by the testimony of the witnesses for the defendants, and the courts throughout the country have very generally held that equality of opportunity in education can exist where segregation is practiced. . . . It would be no substantial advantage to these plaintiffs to admit them to the University Law School. The disadvantages at the College Law School are more than offset by the disadvantages now existing at the University Law School, but in a broad sense it seems clear from the evidence in this case that the best interests of the plaintiffs will be served by denying the relief sought."

Courts . . . federal courts . . . in absence of federal regulation, state statute establishing attorney's lien upon client's cause of action held applicable to suit in federal court based on diversity jurisdiction. ■ *In re An Attorney's Lien Claimed*

by James M. Hoy, U. S. D. C., Mass., October 3, 1950, Supplemental Opinion, October 4, 1950, Wyzanski, D. J. (Digested in 19 U. S. Law Week 2153, October 17, 1950).

On a client's behalf, Hoy filed a complaint in the Massachusetts federal court based on diversity of citizenship and, on the same date, the client released his claims against defendant. Thereafter, defendant filed a motion to dismiss the complaint and Hoy filed a motion to arrest judgment on the ground that he was filing suit in a state court to establish the value of services rendered and to establish an attorney's lien for such services pursuant to state law. Judge Wyzanski noted that the statute conferred upon an attorney a new security and that it therefore created a rule of substantive law. Upon the question of whether a state statute regulating the substantive relationship between a litigant in the federal courts and his counsel violated Article III and the Supremacy Clause of Article VI of the United States Constitution, he stated: "Without in any way intimating any view as to what is the situation where the attorney represents the client in connection with a cause of action which arises out of a federal statute, which is not homologous to a cause of action arising out of state law and which is justiciable only in a United States Court, I direct my attention to the precise issue whether the relationship between an attorney and client in a cause of action brought in the federal court on the basis of its diversity jurisdiction is the *exclusive* concern of the United States Courts. It seems to me it is not. In such a case the federal court applies the rules laid down by the law of the state of the forum. . . . And in such a case the attorney is usually free to present his client's cause to either a federal or a state court. . . . It may be that in this diversity jurisdiction field where the nation and the state have concurrent interests, if the nation's interest finds expression in an Act of Congress, Rule of Court or Executive Order that expression would be paramount and any contrary state rule or even any consistent state rule in the same field would be precluded by United States Constitution Article VI. . . . However, the situation just imagined does not now exist. . . ."

Department of Commerce . . . National Production Authority . . . basic rules of priorities system announced.

■ Code of Federal Regulations, Tit. 32A, Ch. I, Pt. 11, §§11.1–11.31 (15 Fed. Reg. 6632, 6911).

Stating that such was necessary and appropriate to promote the national defense, the National Production Authority has issued its Regulation No. 2 which establishes the kind of orders which are rated orders, how to place rated orders and the preference status of such orders. The Regulation authorizes a single rating to be known as a "DO rating". It is published in the *Federal Register* of October 3, 1950, and, as amended, in the *Federal Register* of October 14, 1950.

Department of Justice . . . registration of Communist organizations and their members . . . regulations pursuant to Subversive Activities Control Act of 1950 announced.

■ Code of Federal Regulations, Tit. 28, Ch. I, Pt. 11, §§11.1–11.3, 11.00, 11.200–11.207 (15 Fed. Reg. 7011).

In the *Federal Register* of October 20, 1950, the Department of Justice announced the regulations and forms prescribed to carry out §§7-10 of the Subversive Activities Control Act of 1950, being Title I of the Internal Security Act of 1950. Those sections deal with the registration and annual reports of Communist organizations, the registration of members of Communist-action organizations, the keeping of a register by the Attorney General and its public inspection, reports to the President and Congress by the Attorney General, and the use of the mails and instrumentalities of interstate or foreign commerce by organizations registered or ordered to register under the Act or by persons in their behalf. The administration of the provisions was assigned to the Internal Security Section, Criminal Division of the Department. The regulations and forms were made effective September 23, 1950, the date of the Act.

Federal Communications Commission . . . television . . . field sequential system of color television adopted.

■ *In re Amendment of §3.606 of Commission's Rules & Regulations, Amendment of Commission's Rules, Regulations, and Engineering Standards Concerning the Television Broadcast Service, Utilization of Frequencies in the Band 470 to 890 Mcs. for Television Broadcasting*, F.C.C., Reports Nos. 50-1064, 50-1224, 50-1225, 50-1227, September 1, 1950, October 10, 1950.

These reports deal only with the issues relating to color television raised in the above proceedings. Hearings on those issues began on September 26, 1949, and closed on May 26, 1950. Fifty-three witnesses were heard, 9,717 pages of testimony were taken, and 265 exhibits were introduced. The First Report, dated September 1, 1950, set forth briefly the Commission's previous action in the field (see 33 A.B.A.J. 500, May, 1947, for a digest of one of the Commission's previous decisions). Pointing out that the Columbia Broadcasting System, Inc. (CBS), Color Television, Inc. (CTI) and The Radio Corporation of America (RCA) were the only proponents of their own color television systems, the Report described the technical characteristics and performance of each. Also, in this Report, the Commission established the following minimum criteria which a color system had to meet to be considered eligible for adoption: (1) it had to be capable of operating within a six-megacycle channel allocation structure; (2) it had to be capable of producing a color picture which had a high quality of color fidelity, had adequate apparent definition, had good picture texture, and was not marred by such defects as misregistration, line crawl, jitter or unduly prominent dot or other structure; (3) the color picture had to be sufficiently bright so as to permit an adequate contrast range and so as to be capable of being

viewed under normal home conditions without objectionable flicker; (4) it had to be capable of operating through receiver apparatus that was simple to operate in the home, did not have critical registration or color controls, and was cheap enough in price to be available to the great mass of the American purchasing public; (5) it had to be capable of operating through apparatus at the station that was technically within the competence of the type of trained personnel hired by a station owner who did not have an extensive research or engineering staff at his disposal and the costs of purchase, operation, and maintenance of such equipment could not be so high as unduly to restrict the class of persons who could afford to operate a television station; (6) it could not be unduly susceptible to interference as compared with the present monochrome system; and (7) it had to be capable of transmitting color programs over intercity relay facilities presently in existence or which might be developed in the foreseeable future. Noting that compatibility ("adaptability" was said to refer to the changes required to enable existing receivers to receive a black and white picture from color transmissions and "compatibility" to the specialized case of "adaptability" where no change whatsoever was required in existing receivers to enable them to receive a black and white picture) was not included in the criteria, the Commission was of the opinion that no satisfactory compatible system had been developed and that, from a technical point of view, compatibility was too high a price to put on color. It concluded that the CTI and RCA systems fell short of the established criteria and that the CBS system, a field sequential system, produced a picture that was most satisfactory in texture, color fidelity and contrast. However, the Commission did not finally adopt the CBS system in its First Report. Instead, it set forth a procedure whereby, if the status quo on compatibility were maintained, a decision would be postponed so that the Commission would give further consideration to large-size direct-view tubes on the CBS system, horizontal interlace, long persistence phosphors and the development of new compatible systems and improvements in existing compatible systems which had been informally called to its attention since the conclusion of the hearing. Attention was called to the fact that one of the easiest methods of defeating an incompatible system was to keep on devising new compatible systems in the hope that each new one would mean a lengthy hearing so that eventually the mere passage of time overpowered the incompatible system by the sheer weight of receivers in the hands of the public. It was suggested that the status quo on compatibility could be maintained by the construction of receivers thereafter manufactured so as to permit the receipt of transmissions within a bracket, *i.e.*, range, of 15,000 to 32,000 lines per second and 50 to 150 fields per second and the equipment of receivers with a manual or automatic switch to select instantaneously between two sets of standards falling within those ranges, one the present monochrome standards and the other the CBS-proposed standards. Manufacturers were requested to submit their comments by September 29, 1950, as to whether they could and would manufacture their receivers with such brackets commencing with the effective date of an order adopting the bracket standards as final. Comrs. Hyde and Hennock wrote separate views in the First Report and Comr. Jones dissented therefrom in part. Inasmuch as the manufacturers who submitted their views indicated inability or unwillingness to meet the bracket requirements and since no other method of maintaining the status quo on compatibility was suggested, the Commission, issued its Second Report, dated October 10, 1950, approving the field sequential system and, on the same day, adopted standards for that system. It did not adopt bracket standards. Stating in the Report that there was still room for experimentation, the Commission pointed out that the new system or other improvement would have to sustain the burden of showing that the improvement which resulted was substantial enough to be worth while when compared to the amount of dislocation involved to receivers then in the hands of the public. Comrs. Sterling and Hennock dissented from the Report. On the same date, the Commission denied RCA's petition for review of further TV demonstrations and CTI's petition to reopen the record. (The latter two orders are printed in 15 *Fed. Reg.* 6936, 6937, October 17, 1950).

Federal Communications Commission . . . broadcasting stations must identify sponsors.

In a notice printed in the *Federal Register* of October 18, 1950, the FCC called attention to the fact that a number of station licensees were not complying with §317 of the Communications Act of 1934 and the Commission's rules and regulations promulgated thereunder which require reference to the sponsor or his product in such manner as to indicate clearly not only that the program is paid for, but also the identity of the sponsor. It was also pointed out that §317 applies with equal force to political broadcasts.

Labor Law . . . Labor Management Relations Act . . . despite history of association-wide bargaining, union may call strike against individual employer after association bargaining reaches impasse . . . dismissal of employees by association members held unfair labor practice . . . strike held not coercion of individual employer in choice of bargaining representative . . . separate negotiations held not refusal to bargain with employers' bargaining representative.

■ *In re Morand Brothers Beverage Co., et al.*, Case No. 13-CA-250, NLRB, September 25, 1950.

Respondents, thirty-five liquor wholesalers in Chicago, and the union which represented their salesmen had bargained collectively on an association-wide basis since 1943. On March 16, 1949, after negotiations for a new contract with repre-

sentatives of the employers' associations had reached an impasse, the union sent a proposed contract to each respondent which was rejected by the associations on behalf of respondents. On April 6, 1949, the union called a strike limited to one respondent, the Old Rose Distributing Co. (hereinafter called Old Rose). Thereupon all thirty-five wholesalers dismissed their salesmen. Charged with violation of §8(a)(1) and (3) of the Labor Management Relations Act, respondents contended: (1) they had not committed unfair labor practices since their action was not taken to undermine the union or as reprisal for concerted activity but was a purely defensive measure necessary to protect their bargaining position vis-à-vis the union, and (2) the union had lost the protection of the Act since, by seeking separate negotiations with Old Rose, it had coerced Old Rose in the selection of its bargaining representative in violation of §8(b)(1)(B) and had refused to bargain with the employers' representative in violation of §8(b)(3).

The majority of the Board upheld the position of the union. Citing their previous decisions that economic interest in preventing a strike did not justify an employer in engaging in conduct proscribed by the Act, they refused to take the "incongruous" position "that a union seeking to negotiate a contract with a group of employers, however large, must strike all or none". On the question of the union's violation of §8(b)(1)(B), they found no evidence that Old Rose had desired the associations to represent it in separate negotiations with the union or that any other representative for such negotiations had been designated and they held that, assuming that the associations had been so designated, an invitation to Old Rose to bargain separately did not *per se* constitute coercion. The invitation to separate negotiations was not deemed to be sufficient evidence that the associations would have been unacceptable. In the opinion of the majority, the record showed that the strike was not called because of objection to dealing with the associations but because of inability to obtain a satisfactory contract through joint bargaining and the proposal during the strike to bargain separately could not reasonably have been construed by Old Rose as having any other object than to secure a satisfactory contract. They further held that the union was required to bargain in the first instance with the negotiators for the associations but that, after an impasse had been reached in association-wide bargaining, the union was free to enter into separate negotiations and they concluded that, to insure the fullest freedom in exercising the collective bargaining rights guaranteed to employees, single-employer units could be found appropriate in the present case. It was stated that, even if the association-wide unit were held the only appropriate one, there was no violation of §8(b)(3) since the union intended to negotiate at an appropriate time for the rest of the employers in that unit.

Member Reynolds, dissenting, was of the opinion that the facts negated, "indeed preclude", a finding that the respondents' conduct was illegally motivated or represented willful interference with lawful employee concerted activity. Stating that "the Union here sought to take advantage of the highly competitive nature of the Employers' operations by resorting to a 'divide and conquer' strategy", he thought such conduct constituted an economic lockout which was not rendered illegal simply because it had the effect of neutralizing the economic pressure exerted by the union. He was of the further opinion that the union's conduct violated §8(b)(1)(B) and (3) and stated that the short answer to the majority's view was that separate negotiations are incompatible with employer-wide bargaining. He was convinced that the union deemed the associations the real stumbling block to a satisfactory contract and he was of the opinion that the association-wide unit was the only appropriate unit for collective bargaining in the present instance.

Monopolies . . . Sherman Anti-Trust Act . . . joint ownership of foreign factories by dominant American exporters of coated abrasives and their agreement not to export to areas foreign factories could supply violates Act absent showing of legal and economic impossibility of exporting at some profit substantial volume of American-made abrasives.

■ *U. S.* v. *Minnesota Mining & Manufacturing Co. et al.*, U. S. D. C., Mass., September 13, 1950, Wyzanski, D. J. (Digested in 19 U. S. Law Week 2133, October 3, 1950).

Defendants, four American manufacturers of coated abrasives who controlled four-fifths of the export trade of that industry, were charged in this injunction suit with combining to restrain foreign commerce in violation of §§1 and 2 of the Sherman Antitrust Act (15 U. S. C. A. §§1-7) through their joint establishment of manufacturing companies abroad and through their agreement not to supply certain areas with American-made goods when those companies could supply the same areas with equivalent foreign-made goods. Defendants conceded that, before May, 1929, they exported from the United States substantial quantities of coated abrasives, that they did not do so in the same volume any longer, and that they supplied substantial quantities of foreign-made abrasives to the same areas, but they contended that they could no longer export to those areas profitably because of the economic and political barriers imposed by foreign governments. The Court stated that it was axiomatic that if over a sufficiently long period American enterprises, as a result of political or economic barriers, could not export directly or indirectly from the United States to a particular foreign country at a profit, then any private action taken to secure or interfere solely with business in that area, whatever else it might do, did not restrain foreign commerce in that area in violation of the Sherman Act, since under that hypothesis there would have been no American foreign commerce to restrain. The Court, however, held that there was

insufficient evidence to justify a finding of fact that, if defendants had not established joint foreign factories, it would have been legally or economically impossible to sell at some profit a substantial volume of defendants' American-made abrasives and, on the contrary, found defendants' decline in exports attributable to their desire to sell their foreign-made goods at a large profit rather than their American-made goods at a small profit and in a somewhat reduced volume. It held that prima facie there could hardly be a more obvious violation of §1 of the Sherman Act and that such action was not protected by the Webb-Pomerene Act (15 U S C §§61-65) which is limited to "export trade" consisting of "commerce in goods". It was said that, even though there was an economic or political barrier which entirely precluded American exports to a foreign country, a combination of dominant American manufacturers to establish joint factories for the sole purpose of serving the internal commerce of that country might *per se* violate the interstate commerce clause of the Sherman Act since the intimate association of the principal American producers in day-to-day manufacturing operations, their exchange of patent licenses and industrial know-how, and their common experience in marketing and fixing prices might inevitably reduce their zeal for competition *inter sese* in the American market. Consideration of a possible violation of §2 of the Act was found to be unnecessary. Remarking that "Surely the 1918 Congressional policy of promoting export corporations contemplated many of the features at which the 1950 Department of Justice looks askance", the Court did not agree with the Government that an export company which defendants had organized under the Webb-Pomerene Act should be dissolved and their agreement to export only through that company held invalid *in toto*. It said: "The recruitment of four-fifths of an industry into one export unit was foreseen by Congress. . . . The assignment of stock in an export association according to quotas, if not foreseen, has at least been silently acquiesced in. . . . There may have been no similar Congressional provision or approval of the firm commitments of members to use the unit as their exclusive foreign outlet, the refusal of the unit to handle the exports of American competitors, the determination of what quotas and at what prices each member should supply products to the unit, the fixing of re-sale prices at which the unit's foreign distributors should sell and the limitation of distributors to handling products of the members. Nonetheless, these are all such normal features of any joint enterprise and usually so essential to its stability and to preventing its members from taking individual selfish advantage of the knowledge and opportunities that have come to them as a group that, absent special circumstances revealing their unfairness or oppressive character in a particular setting, they are not outside the license granted by the Webb-Pomerene Act." However, it held unlawful (a) the agreement to export only through the export company when used in conjunction with the program under which the company chose not to export to areas where the foreign companies could supply abrasives at a large profit, (b) the agreement not to export independently before 1966 because the period was unreasonably long, and (c), except where asserted differentials in service actually existed, the export company's practice of establishing prices 10 to 30 per cent higher for competitive American exporters than for its foreign distributors.

Monopolies . . . Sherman Antitrust Act . . . medical societies have not restrained or monopolized prepaid medical care in Oregon . . . practice of medicine is not trade within Act.

■ *U. S.* v. *Oregon State Medical Society et al.*, U. S. D. C., Ore., September 28, 1950, McColloch, D. J. (Digested in 19 U. S. Law Week 2141, October 10, 1950).*

The Government contended that: (1) defendants, beginning about 1936, conspired to restrain and monopolize prepaid medical care in Oregon, (2) Oregon State Medical Society and eight county and regional societies attempted to restrain and monopolize prepaid medical business in areas where they operate, and (3) those societies did restrain and monopolize prepaid medical business in those areas. Saying that his work as a trial judge did not permit the preparation of a formal opinion in so complex a case, Judge McColloch stated his conclusions on the main issues and appended notes made throughout the trial. One of the main questions was whether, in the formation of their own prepaid nonprofit organization, Oregon Physicians' Service, the Oregon doctors had violated the antitrust laws. Judge McColloch was of the opinion that they had not. He held that the Oregon Physicians' Service was not a conspiracy but rather an entirely legal and legitimate effort by the profession to meet the demands of the times for broadened medical and hospital service, eliminating the evils of privately owned concerns as well as the element of private profit. Noting that the question of whether the professions were exempt from the Sherman Act had been reserved by the Supreme Court, he made a finding and/or conclusion that the practice of medicine was not a trade within the meaning of that Act.

The following are quoted from the notes appended to his conclusions:

"Note 7

Fee Fixing

Of course, if the professions are trades, then fee schedules become (under Supreme Court decisions) per se unlawful. . . ."

"Note 9

'The Sherman Acts means What the Courts Say It Does'

The Supreme Court has held that Organized Labor does not come under the anti-trust laws. This was court-made law.

Can it be justly contended that the Congress intended to include the

* The form of the opinion in the present case is such that an exact report of the facts cannot be given the reader.

professions when it enacted the Sherman law in 1890. The American Medical Association had been in existence 43 years. The American Bar Association was organized in 1878."

"Note 12

The Age of the Common Man

In a measure, this case is an attack on the professions. Everything critical of the doctors that has been said in the case could be said of the legal profession. . . ."

"Note 13

Self-Preservation

. . . [Can it be] that organized medicine must remain a sitting duck while socialism overwhelms it? I would not expect an American court to hold that."

"Note 27

The A. M. A. Case

The present case represents an effort to apply the decision obtained against the American Medical Association (317 U. S. 519) to Oregon. The facts are different. The times are different."

National Labor Relations Board . . . memorandum issued describing authority and assignment of responsibilities to General Counsel.

(15 Fed. Reg. 6924)

The NLRB has issued a memorandum, effective October 10, 1950, which describes the authority and assignment of responsibilities to the General Counsel of the Board. He has "full and final authority and responsibility, on behalf of the Board . . . to dismiss charges . . . to issue complaints and notices of hearing". With respect to petitions for court enforcement and resisting petitions for court review, however, the memorandum provides that the General Counsel will act "[o]n behalf of the Board . . . in full accordance with directions of the Board", that he will initiate injunction proceedings under Section 10 (j) or under Sections 10 (e) and (f) of the Act or contempt proceedings only on approval of the Board, and that he will initiate review proceedings in the Supreme Court when authorized by the Board. The memorandum covers case handling, internal regulations, state agreements, liaison with other governmental agencies, anti-Communist affidavits, and miscellaneous litigation involving Board and/or officials and personnel. It is printed in the *Federal Register* of October 14, 1950.

The President . . . National Advisory Committee on Mobilization Policy established.

■ Executive Order 10169 (15 Fed. Reg. 6901).

On October 11, 1950, the President established the National Advisory Committee on Mobilization Policy to consult with and advise the National Security Resources Board on national mobilization policy. The members of the Committee will be appointed by the Chairman of the Board and will include persons whose experience and ability equip them to represent business, labor, agriculture, and the public as a whole. The Order is printed in the *Federal Register* of October 14, 1950.

Removal of Causes . . . actions arising under Constitution or laws of the U.S. . . . actions to determine validity of employer's authorizations to deduct union dues and fees from employees' wages held not removable to federal court where actions are grounded upon state law of contracts even though actions might have been brought in federal court.

■ *John Hancock Mutual Life Ins. Co.* v. *United Office & Professional Workers of America et al., Stephens et al.* v. *John Hancock Mutual Life Ins. Co. et al.*, U. S. D. C., N. J., September 9, 1950, Forman, D. J.

Both these suits were originally brought in New Jersey state courts. The first, brought by the insurance company (hereinafter called Hancock) against the United Office & Professional Workers of America (hereinafter called UOPWA) and twenty individuals, who were members of UOPWA and employees of Hancock, sought to determine the party to whom union dues and other fees collected by Hancock should be turned over. The complaint alleged that, on July 1, 1949, Hancock had entered into a bargaining contract with UOPWA, then affiliated with the CIO, that pursuant thereto it had collected union dues and fees from its employees who had signed one-year irrevocable written authorizations for it to do so, and that the individual defendants had given notice that they were cancelling their authorizations before their expiration. The complaint set forth the possibility of Hancock's incurring criminal liability under the Labor Management Relations Act for deducting dues from employees' wages without their consent. The second suit (hereinafter referred to as the Stephens case), brought by individual employees of Hancock, sought to enjoin Hancock from deducting and transmitting monies to UOPWA pursuant to the check-off authorizations on the ground that they were no longer valid since continued affiliation of UOPWA with the CIO was consideration for and condition precedent to the execution of their authorizations, as well as those of others in their class, and there had been a failure of consideration and a breach of the condition when UOPWA was expelled from the CIO. On motion by Hancock, UOPWA had been joined as a defendant in this suit.

Both cases had been removed to the federal court on motion by UOPWA and, in both, motions to remand had been filed. The jurisdiction of the Court depended upon whether the actions had arisen under the Constitution or laws of the United States, especially the Labor Management Relations Act (29 USC §§185, 186) and the statute conferring upon the federal district courts original jurisdiction over civil actions arising under an Act of Congress regulating commerce (28 USC §1337). Noting that only the facts set out in the complaint were determinative of removal jurisdiction and that doubts should be resolved in favor of remand, the Court held that basically both cases revolved around the validity of attempted revocations of irrevocable assignments of dues from wages by employees and that this issue could be resolved by resort to the ordinary contract law of the state wherein the contracts were made. Even if it were assumed that the federal court would have

had jurisdiction if plaintiffs had chosen that forum, that, said the Court, would not have meant that the actions were ones arising under the laws of the United States. The Court expressed regret that time was being consumed in jockeying for a forum for the determination of important questions and closed with the statement: "Perhaps the effective and prompt despatch of litigation which now characterizes the New Jersey court system may be utilized in promptly prosecuting these cases to conclusions determinative of the important questions raised in them."

Further Proceedings in Cases Reported in this Division

■ The following action has been taken in the United States Supreme Court:

PROBABLE JURISDICTION NOTED, October 17, 1950: *Werner* v. *Southern California Associated Newspapers*—Libel and Slander (36 A.B.A.J. 494, June, 1950).

CERTIORARI GRANTED, October 10, 1950: *International Workers Order, Inc., and Drayton* v. *McGrath et al.*—Constitutional Law (36 A.B.A.J. 406, May, 1950).

CERTIORARI GRANTED, October 23, 1950: *U. S.* v. *Dennis et al.*—Crimes (36 A.B.A.J. 856, 938, October, November, 1950). [See also *U. S.* v. *Foster et al.*—Jury (35 A.B.A.J. 422, May, 1949), *U. S.* v. *Gates, U. S.* v. *Hall and Winston*, and *U. S.* v. *Green*—Contempt (35 A.B.A.J. 850, 1022, October, December, 1949); *U. S.* v. *Sacher et al.*—Contempt (36 A.B.A.J. 491, June, 1950).]

CERTIORARI DENIED, October 10, 1950: *North Little Rock Transportation Co., Inc.* v. *Casualty Reciprocal Exchange et al.*—*Monopolies* (35 A.B.A.J. 1019, December, 1949, 36 A.B.A.J. 496, June, 1950); *Johnson* v. *Matthews*—Habeas Corpus (36 A.B.A.J. 573, July, 1950); *Halsted et al.* v. *Securities and Exchange Commission*—Utilities (36 A.B.A.J. 495, June, 1950); *McCready* v. *Byrd et al.*—Constitutional Law (35 A.B.A.J. 1017, December, 1949; 36 A.B.A.J. 572, 577, July, 1950); *Alberty et al.* v. *Federal Trade Commission*—Federal Trade Commission Act (36 A.B.A.J. 409, May, 1950).

CERTIORARI DENIED, October 17, 1950: *Ford Motor Co. et al.* v. *Ryan*—Appeal and Error (36 A.B.A.J. 571, July, 1950); *Hitaffer et al.* v. *Argonne Co., Inc.*—Husband and Wife (36 A.B.A.J. 680, August, 1950).

Department of Legislation

Harry W. Jones, Editor-in-Charge

■ The exercise of congressional investigatory power is often, perhaps inevitably, accompanied by injury to the reputation and standing of individuals involved, in one way or another, in the activities within the general area of investigation. No thoughtful student of our political institutions would be willing to see congressional investigations made subject to checks so stringent as to destroy the effectiveness of this device for congressional fact-finding and congressional scrutiny of executive action. But lawyers, particularly, feel a natural concern about the individual who sustains an unjustified injury to his reputation as an incident of congressional investigation and is left without a remedy. This short article, which is taken from a broader study of current problems in congressional investigatory procedure, examines one of the current remedial proposals. The author, Walter D. Sohier, is a member of the staff of the Legislative Drafting Research Fund.

Congressional Immunity: Conflicting Policies and a Possible Remedy

By Walter D. Sohier

■ In recent months the interest of lawyers and laymen has been attracted to the law of congressional immunity. This general interest has been brought about by a series of congressional investigations which have occasioned the charge from some quarters that the immunity (which stems from Article I, Section 6 of the Constitution of the United States and, in the case of legislative witnesses, from the common law) has been abused. Reflecting this aroused interest in the subject is the introduction of S. 4113 by Senator Lester Hunt of Wyoming on September 1, 1950. It is the purpose of this note to sketch in the background of the congressional immunity doctrine and to examine briefly the proposed remedy embodied in S. 4113.

Sharply Conflicting Policies Characterize Problem

The origin of this, immunity, protection for members of Congress and for witnesses who appear before committees of Congress lies buried in the musty annals of Anglo-American law. This suggests the possible value of a reappraisal of the policy underlying the immunity, in the light of the changed conditions of modern times. Indeed, a fresh look at the law reveals certain clear and significant conflicts in policy. On the one hand, there is the policy in favor of freeing members of Congress and congressional witnesses from any apprehension of vexatious litigation, in order to promote the easy acquisition of accurate and complete information and to make possible complete freedom of discussion and independence of thought in the enactment of legislation. Threats of litigation might

provide a means of corrupting and compromising the lawmakers, and there is the further danger that the occurrence of pecuniary loss to Congressmen for defamatory statements might lead to a decline in the number and caliber of men willing to assume the risks of this high elective office.

On the other hand, it is one of the oldest policies of our law to allow a person to enjoy a good reputation when he has done nothing to cause injury to it and to be able to enforce this right. Related to this is the possible deterrent effect of indiscriminate defamation on outstanding citizens who might otherwise have undertaken government employment, leaving important executive posts to be filled, at times, by those whose reputations have less to lose. There is also the public interest in keeping the citizenry accurately informed on questions of national importance, an interest to which misleading slander and libel seem clearly opposed.

The subordination of the private right of reputation to the demands of the public interest in complete congressional freedom has, in the past, been thought to be a reasonable requirement. But certain new factors cast doubt on the present-day adequacy of this easy formulation of the policy issue. The factors that magnify the public interest in the preservation of reputations include, at least, the following: (1) the growth of media of mass communications; (2) the increased number of congressional investigations into matters which tend to be defamatory in nature: loyalty, political and ideological beliefs, and the like; (3) the public confusion and demoralization which may result from frequent and highly publicized occasions of defamation; and (4) an ever-growing need for capable public servants in the Government. To resolve this conflict between policies which have come to be of almost equal importance, without encroaching on or weakening either, is the legislative problem now posed. S. 4113 suggests one avenue of approach: to make available a suit against the Government where, but for the law of congressional immunity, a private action would lie.

S. 4113 Proposes an Extension of Tort Claims Act Principle

In its proposed creation of an enforceable right against the Government, S. 4113 brings to mind the Tort Claims Act of 1946. It is to be noted, however, that the Tort Claims Act itself does not include libel or slander committed by government employees. The reason for this exception from the broad coverage of that Act is anything but clear from the Act's legislative history, and, in view of the rather weak explanations which have been offered, considerable support for extending the Tort Claims Act has sprung up. Illinois and New York have adopted claims statutes drawn sufficiently broadly to include libel and slander committed by state employees without any evidence that dire consequences have followed. S. 4113 is, in effect, a proposal to extend the principle of the Tort Claims Act further still, to cover defamation committed not by executive employees but by members of Congress, and it is reasonable to include congressional witnesses within such an extension. The total proposal seems quite consistent with the purpose of the Tort Claims Act, which, by establishing efficient procedural methods for dealing with claims that otherwise would be consigned to more laborious and less reliable processes, greatly strengthens the general policy of our constitutional and statute law favoring compensation for personal injury or property damage suffered by individuals in the public interest.

Hunt Proposal Suggests Many Legislative Problems and Possibilities

Certain quite apparent problems would have to be taken account of in the enactment of legislation along the general lines of S. 4113. It is quite conceivable that a flood of litigation might ensue, and, in view of this possibility, it is arguable that some such ingredient as express malice should be required to be shown before the suit can be brought against the Government. Furthermore, the ancient remedy of damages hardly compensates an injured party adequately. Usually it is an effective, well-publicized name-clearing which is most desired. If a federal court is given jurisdiction over such a case, its decision may well conflict with the findings of a legislative committee, and the executive branch of the Government might encourage this result by failing to provide for a vigorous defense of the action, particularly if only a name-clearing, not damages, is sought. To avert this potentially ridiculous situation, it may be that court jurisdiction should be denied if Congress, by committee action or otherwise, gives the victim a fair exoneration within a reasonably limited period of time. Whether an exonerating report adopted by a bare committee majority actually fulfills this requirement is, of course, problematical.

This glance at the legislative possibilities opened up by S. 4113 indicates that Senator Hunt's proposal constitutes no complete solution to the problem of accommodating the public interest in searching congressional investigation with the private interest in good reputation. There is vast room for corrective legislation with respect to committee procedure as suggested, for example, by the provisions of the Holifield Bill (H.R. 174, 81st Cong., 1st Sess.). Another new and largely unexplored field is in the area of mass communications, where legislation may be worked out to protect individuals from the worst effects of a widely publicized defamation. In any event, the growing dissatisfaction with the law of congressional immunity in its present form suggests the likelihood that corrective legislation in some form may soon be enacted.

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman, Harry K. Mansfield, Vice Chairman.**

Evidence in Reasonable Compensation Cases

■ Establishing the reasonableness of a compensation deduction is often a tough problem for both an employer and his attorney. They may build up a substantial case, based on the employer's own information and the testimony of witnesses who are well qualified to judge the reasonableness of the salary question. Despite this, they run the real and ever-present risk that their documented and well-supported figure will be challenged by the Commissioner of Internal Revenue and reduced by the Tax Court or a district court without the introduction of a single iota of evidence by the Commissioner!

This vexing problem stems from the very nature of the limitation "reasonable". Although the reasonableness of compensation paid to any particular employee is admittedly a question of fact, it is obviously a very flexible kind of fact. Opinions, rather than hard and fast standards, are the ultimate determinants of what is reasonable. That is why the deductions for larger salaries are such vulnerable items on a tax return, especially when there is heavy pressure on Bureau employees to produce the utmost in revenue.

The employer may believe that all the facts, including the opinions of qualified, unbiased witnesses justify a $20,000 salary as reasonable. If the revenue agent *thinks* that $10,000 is the ceiling of reasonableness, he will disallow $10,000 of the employer's deduction, without having to produce any proof to justify his conclusion.

If the employer takes his case to the Tax Court (or district court), this is what may happen. After he puts in his own evidence and that of supporting witnesses that $20,000 is a reasonable salary, the Commissioner will disagree, again introducing no evidence to support his determination that $10,000 is the proper amount. Despite the lack of any evidence on behalf of the Government, chances are that the Tax Court will act as an arbitrator rather than confine itself to the employer's testimony. The result may be an allowance of some figure between the $20,000 claimed by the employer and the Commissioner's $10,000 allowance.

The Courts of Appeals for the Fifth and Sixth Circuits have taken a stand against this practice which should help employers and attorneys in those circuits and may point the way for similar action in other circuits. In *Roth Office Equipment Company* v. *Gallagher*, 172 F. (2d) 452, the employer claimed salary deductions of $86,482. The Commissioner cut that to $51,482 and a district court allowed $67,500. The Sixth Circuit pointed out that the only direct evidence before the district court on the issue of reasonableness of compensation came from two well-qualified, impartial witnesses on behalf of the employer. Their credibility was not put in issue. The Government "offered no witness to contradict this testimony or to testify in any way that the compensation was unreasonable to any extent. On this crucial and single issue of fact in this case this unimpeached, uncontradicted testimony from well-qualified, impartial witnesses can not be disregarded by the Court. This Court has several times stated that such testimony should be accepted by the fact-finder in a matter in which the fact-finder has no knowledge or experience upon which he could exercise an independent judgment. [Citing cases] . . . if the compensation paid is unreasonable the appellee certainly could have produced some experienced witness from the industry who would have said so, and the failure to offer such a witness on the crucial issue in the case operates very strongly against his contention. The burden of proof in cases of this kind is upon the taxpayer, but we are of the opinion that that burden has been met when the taxpayer introduces uncontradicted, unimpeached testimony from well-qualified, impartial witnesses sustaining its contention, unless the established facts themselves are such as to show that such testimony ought not to be accepted."

In *Wright-Bernet, Inc.* v. *Commissioner*, 172 F. (2d) 343, the Sixth Circuit insisted on the same standards of evidence for the Tax Court. Here the employer claimed deductions of $73,840 which the Commissioner reduced to $41,000. The Tax Court settled on $61,040 as the allowable amount. In reversing and remanding, the upper court said: "The Tax Court in its findings of fact adopted and reiterated the material evidence introduced by the petitioner, and then decided that the compensation of each employee for one year was unreasonable in the amount of $140, and for the second year in a greater amount. As the petitioner's witnesses were qualified and unimpeached, and no evidence was given to the contrary, their testimony should have been accepted."

In its latest case on this point, *Mayson Manufacturing Company* v. *Commissioner*, 178 F. (2d) 115, the Sixth Circuit summed up the situation this way: "This is another case, similar to others referred to herein, where all the testimony before the Tax Court was on behalf of the petitioner. The Commissioner introduced no witness in his behalf. No witness testified that the compensa-

tion fixed by the Tax Court for each of the three officers was in fact reasonable compensation for the services rendered. We do not know from the record how those figures were arrived at. On the contrary, petitioner's testimony was that the compensation actually paid was reasonable compensation in each instance. No opportunity was afforded petitioner to cross-examine any witness who might have testified for the respondent to the contrary or to test the correctness or fairness of the figures selected by the respondent and the Tax Court." What makes this case even more important than the earlier ones is the court's attitude where the employer's witnesses can not be described as impartial. It said: "We recognize that in the present case petitioner's evidence on the issue was not from impartial witnesses. But, nevertheless, it was uncontradicted and was not referred to in the opinion of the Tax Court as being unworthy of belief. Under such circumstances, the failure of the Commissioner to introduce testimony supporting the deductions made by him lends considerable support to our view, gathered from other undisputed facts in the case, that the findings of the Tax Court on the issues involved are clearly erroneous and should be set aside."

In *J. H. Robinson Truck Lines, Inc.* v. *Commissioner,* decided July 7, 1950, the Fifth Circuit by a two-to-one decision insisted on the same standards of evidence. The court pointed out that two witnesses for the employer "testified positively and without equivocation, contradiction, or impeachment, that the salaries paid Robinson were in line with, that is the same as, salaries paid to presidents of similar companies . . ." It then went on to say:

"The Commissioner offered no evidence. The Tax Court rejected all of the evidence of all of the witnesses, and upon a record containing no evidence whatever supporting them, sustained the Commissioner's determinations that the rents and salaries were excessive. Upon settled principles, it cannot do this, and in doing so, it erred."

These decisions will be doubly important if and when a new excess profits tax is enacted. Revenue agents will scrutinize compensation deductions even more critically than in periods of normal taxation. The decisions of the Courts of Appeals for the Fifth and Sixth Circuits may keep the more overzealous revenue gatherers within reasonable bounds.

This note contributed by committee member Leon Gold.

Practising lawyer's guide to the current LAW MAGAZINES

Calvin P. Sawyier • Editor-in-Charge

CONTRACTS—A casenote to the case of *Robberson Steel Company* v. *Harrell,* 177 F. (2d) 12 (C. A. 10th 1949) in the Spring, 1950, issue of the *Indiana Law Journal* (Vol. 25, No. 3, pages 352-357) presents an analysis of the question of the right to repudiate an installment delivery contract for a default of the other party when the repudiating party himself was in default with respect to a prior installment. The writer concludes that the court in the instant case misconceived the general rule that a party in unexcused default of an essential covenant cannot rescind for the other party's default and, further, that the rule is properly stated to apply only to a subsequent breach by the other party which is causally connected with the first party's own prior default. (Address: Indiana Law Journal, Indiana University School of Law, Bloomington, Ind.; price for a single copy: $1.00.)

DISCOVERY AND INSPECTION—In the May-June, 1950, issue of the *Journal of Criminal Law and Criminology* (Vol. 41, page 64) Keith Ragan discusses the right of a defendant to inspect the results of state conducted tests and experiments. The writer points out that, although a defendant can secure the results of such tests at the trial, there is virtually no opportunity to secure them before the trial begins. The courts generally deny pretrial inspection of experimental results on the ground that a state may not be forced to disclose its evidence. Because of this Mr. Ragan feels that legislative action will be necessary to accomplish inspection rights for the accused. (Address: Journal of Criminal Law and Criminology, Northwestern University School of Law, 357 E. Chicago Avenue, Chicago 11, Ill.; price for a single copy: $1.25.)

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.

LEGAL PROFESSION—*"Economic Status of the Legal Profession in Chicago"*, by Leonard Kent, in the July-August issue of the *Illinois Law Review* (Vol. 45, No. 3, pages 311-332), is the report of a study conducted under the auspices of the Chicago Bar Association which had as its purpose the measurement and evaluation of factors affecting the levels and variability of incomes received by Chicago members of the legal profession during 1946 and 1947. Complete with tables, the paper concentrated its inquiry on such factors affecting the size of income as the effect of age and years in practice, nonprofessional and professional training, organization of practice, and type of practice. Such factors as the endowment, character, and social and professional connections of the individual lawyer may, although not accurately measurable, counteract the measurable elements brought into focus by the study. But the results give, with this admitted limitation, an insight into matters which are of interest to lawyers in large cities throughout the country. (Address: Illinois Law Publishing Corporation, Northwestern University School of Law, Chicago 11, Ill.; price for a single copy: $1.25.)

MINES AND MINERALS—*"Defects and Ambiguities in Oil and Gas Leases"*: In the *Texas Law Review* for October, 1950 (Vol. 28—No. 7; pages 895-909), A. W. Walker discusses the uncertainties still lingering in even the standard clauses (such as the granting clause, habendum clause, unless clause, and dry hole clause) of the forms of oil and gas leases now being used. The author raises a series of questions, based on hypothetical situations, to which the existing decisions give no clear answer. To the would-be conveyancer, however, is issued a word of caution: revisions of the basic clauses of oil and gas leases should be made only by persons familiar with the evolutionary development of the modern forms. (Address: Texas Law Review, University of Texas School of Law, Austin, Tex.; price for a single copy: $1.00.)

NEGOTIABLE INSTRUMENTS—*"Instruments 'Payable at' a Bank"*: Pointing out the confusion which exists over the meaning and effect of the practice of drawing instruments payable at a bank, Roscoe Steffen, Professor of Law at the University of Chicago Law School, in the autumn issue of the *University of Chicago Law Review* (Vol. 18—No. 1; pages 55-76) examines how the legal rules concerning instruments payable at a bank have grown up, assesses their effect upon practice, and suggests what rules should be adopted in the new Commercial Code. It is Professor Steffen's contention that the practice of discussing these instruments in terms similar to Section 70 of the NIL (instruments so payable are equivalent to a tender if the maker or acceptor is "able and willing to pay it there at maturity") or in terms similar to Section 87 (such an instrument is equivalent to an order to the bank to pay) and Section 186 (any loss due to failure of the bank should be on the holder who delays in presentment) has led only to a state of confusion which is not resolved by the latest draft of the Commercial Code. He suggests that there be a special provision in the Code for instruments payable at a bank and offers his proposals as to the content of this special provision. (Address: University of Chicago Law Review, Chicago 37, Illinois; price for a single copy: $1.75.)

PROCEDURE—*"Pre-Trial Conference and Its By-Products"*: This article in the Summer, 1950, issue of the University of Illinois *Law Forum* (No. 2, pages 206-235) by Judge Harry M. Fisher is of particular interest because it presents a candid statement, realistically illustrated by actual transcripts from certain pretrial hearings, of the view that pretrial conference aims not only at the simplification of issues but also at the disposition of cases through settlement. Also valuable is the broad outline of the general problems and techniques of pretrial conference procedure which the author presents. This article was used as one of the bases for discussion of the subject by the American Bar Association at their most recent meeting. (Address: Law Forum, University of Illinois College of Law, Urbana, Ill.; price for a single copy: $1.00.)

TRADE REGULATION—*"Constitutionality of Fair Trade Pricing Re-Examined"*: This comment in the July-August, 1950, issue of the *Illinois Law Review* (Vol. 45—No. 31; pages 378-391) presents a reappraisal of the constitutional validity of fair trade laws in the light of the recent Florida and Mississippi decisions holding such laws invalid. The various possible grounds of objection, due process, equal protection, and delegation of legislative power to private parties, are examined and found lacking in substance. However, liquor control laws, involving compulsory price fixing as an ostensible means of accomplishing the broader legislative end of regulating the inherent evils of intoxicating liquors, are placed by the author in another category and the recent invalidation of such laws is considered supportable. (Address: Illinois Law Review, Northwestern University School of Law, Chicago 11, Ill.; price for a single copy: $1.25.)

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

■ The eighth annual photographic contest, sponsored by the Younger Members Committee of the Chicago Bar Association included seven portraits, twenty-two color prints, and nineteen prints of a general character. The grand prize of one year's dues was awarded to Lester E. Munson. Prizes of twenty and ten dollars were awarded in each of the three classes.

■ At its fifty-first annual dinner, the Bar Association of Nassau County, New York, Inc., presented to General Dwight D. Eisenhower an honorary membership in the Association, and also the Association's Distinguished Service Award. Among those who have received this award in the past are Carter Glass, Herbert Hoover, Alfred E. Smith and Thomas E. Dewey. Canon Sidney R. Peters of Bay Shore was also elected an honorary member. John W. Davis presented Canon Peters with his certificate of honorary membership.

Joseph W. PLANCK

■ The Honorable Harold R. Medina, Judge of the United States District Court for the Southern District of New York, was the guest of honor and principal speaker at the annual meeting of the State Bar of Michigan held in September at Grand Rapids. More than 1,500 persons attended the dinner at which Judge Medina spoke. Music was furnished by the Detroit Bar Association Glee Club.

Speakers at the annual luncheon were Erle Stanley Gardner, author-lawyer who created the character of Detective Perry Mason; Cody Fowler, President of the American Bar Association; and Nicholas Kelley, Jr., resident attorney and secretary of the Chrysler Corporation.

The annual meeting approved a resolution condemning socialized medicine, and another proposing the extension of social security to lawyers was defeated. At the meeting of Commissioners of the State Bar the following officers were elected for the 1950-1951 term: Joseph W. Planck, President; Lester P. Dodd, First Vice President; David C. Pence, Second Vice President; Hazen E. Kunz, Secretary; and R. Burr Cochran, Treasurer.

■ Dearborn Inn was the scene of the annual convention of the Michigan Judges Association September 7 and 8. Officers elected at the business meeting were Circuit Judge John C. Shaffer, Gladwin, President; Judges George W. DesJardins, Lapeer, and James R. Breakey, Jr., Ann Arbor, First and Second Vice Presidents, respectively; Judge Archie D. McDonald of Hastings, Secretary-Treasurer; and Miss Ann V. Kramer of Detroit, Assistant Secretary-Treasurer. Judge Joseph A. Moynihan was re-elected Presiding Circuit Judge of Michigan. Speakers presented at the Thursday luncheon were Chief Justice Emerson R. Boyles, Carl H. Smith, President of the State Bar of Michigan, and Judge William E. Doran, of Flint, President of the Probate Judges Association. Governor G. Mennen Williams spoke briefly at the banquet on Thursday evening, as well as Karl Detzer, roving editor for the *Reader's Digest*. Judge Ira W. Jayne presided.

January 18, 19 and 20, 1951, have been set as the dates for the second annual institute on oil and gas law and taxation, presented by the Southwestern Legal Foundation, Dallas.

This three-day institute will deal with such problems of current interest as the analysis of a typical oil and gas lease and the many problems incident to assignments of the various interests. Both the property aspects and an analysis of the tax problems involved will be discussed.

There will be top-level discussions of geological and geophysical exploration costs from both the oil and gas standpoint and the taxation standpoint. There will be lectures on subjects such as the ramifications of the *Abercrombie* case and others. The institute will be held in the newly constructed Oil and Gas Wing of the Southwestern Legal Center, Dallas.

■ The Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association reports the following recent activities:

The six concise booklets to be included in the committee's Series Two are nearing completion and will all be off the press in a short time. They include the following:

Family Law

Bankruptcy and Arrangement Proceedings

Organizational Problems of Small Businesses

The Drafting of Corporate Instruments

The Federal Wage and Hour Act

Procedure Before the Bureau of Internal Revenue

These books may be purchased through the Committee on Continuing Legal Education, 133 South 36th Street, Philadelphia 4, Pennsylvania, at $2 per copy or $10 for the entire series.

Institutes and lecture courses planned for the immediate future

are as follows:

Federal Legislation and Regulation, with the Philadelphia Bar Association in Philadelphia under the chairmanship of Mark E. Lefever. This includes the following subjects: "The Federal Social Security Act as Amended" by Nicholas A. Stockman, Assistant Manager of the downtown Philadelphia office of the Federal Social Security Administration. "The Revenue Act of 1950" by Allan H. W. Higgins, of Boston. "Labor Relations Law" by Burton A. Zorn, of New York City, Kenneth Souser, of Philadelphia, and Edward Davis, of Philadelphia. "The Federal Employers' Liability Act" by Joseph S. Lord III, of Philadelphia. "The Federal Tort Claims Act" by Guy K. Bard, Judge of the United States District Court for the Eastern District of Pennsylvania. "The Robinson-Patman Act" by Kendall B. DeBevoise, of New York City. "The Federal Wage and Hour Act" by Robert A. Levitt, of the Legal Department of the Western Electric Company, Incorporated.

Trial Techniques and Bankruptcy and Arrangements Proceedings with the Georgia Bar Association, December 7, 8 and 9, 1950, Atlanta, Georgia, Chairman, G. Arthur Howell, Jr. An outstanding program has been prepared for this annual mid-winter meeting of the Georgia Bar Association. The program includes the following: "Initiating Proceedings" by Philip Werner Amram, of the District of Columbia and Pennsylvania Bars. "The Trial of a Civil Action" by Joseph S. Lord III, of Philadelphia. "Direct and Cross-Examination" by Francis X. Busch, of Chicago. "Defense Tactics" by Jerry Giesler, of Los Angeles. "How To Conduct a Bankruptcy Proceeding" by Jacob I. Weinstein, of Philadelphia. "How To Conduct an Arrangement Proceeding" by John E. Mulder, Director of the Committee on Continuing Legal Education of the American Law Institute collaborating with the American Bar Association.

A series of institutes was successfully carried on last winter with the Lycoming County Bar Association at Williamsport, Pennsylvania; the institutes will be held again this year under the leadership of Clyde Williamson, of the Williamsport Bar. On October 11 an institute on the Pennsylvania Fiduciaries Act was held with Roland Fleer, of Norristown, Pennsylvania, as the speaker. Other institutes for the balance of 1950 include "Basic Accounting for Lawyers" on November 8 by Barton E. Ferst, of Philadelphia, and "The Trial of a Negligence Action" on December 13 by Joseph S. Lord III, of Philadelphia. Three or four additional institutes are planned for January, February and March of 1951.

A series of institutes has also been planned by the Montgomery County Bar Association in Norristown, Pennsylvania. An institute on "The Drafting of Partnership Agreements" was given on October 25, the speakers being George Craven and James Sutton, of the Philadelphia Bar. This will be followed by "Basic Accounting for Lawyers" on November 29 by Barton E. Ferst, of Philadelphia, and by "Labor Relations Law" in December.

"Legal Problems in Tax Returns" was given in Nashville, Tennessee, on October 20, with the co-operation of the Vanderbilt University Law School and the Nashville Bar Association. The speakers were William Sutherland, of Washington, D.C., Leonard Sarner, of Philadelphia, and William J. Bowe, Professor at Vanderbilt University Law School. More than 300 lawyers were in attendance.

The Junior Bar of Jackson, Mississippi, and the University of Mississippi Law School have planned an Institute on Legal Problems in Tax Returns and Estate Planning in Jackson on November 23 and 24, under the chairmanship of William N. Ethridge, Jr. Speakers are William J. Bowe, of Nashville, Tennessee, and John H. Boman, Jr., and Randolph Thrower, both of Atlanta, Georgia.

The New Hampshire Bar Association announces its first Institute in collaboration with the Committee on Continuing Legal Education, in Concord, December 8, with George P. Cofran, of Concord, as Chairman. Speakers are Charles D. Post and John Powell, both of Boston.

Another Institute in Fargo, North Dakota, will be held on December 2, on "Legal Problems in Tax Returns". This project, under the directorship of Ronald N. Davies, is sponsored by the North Dakota State Bar. The lecturers are Laurens Williams, of Omaha, Nebraska, and Jack R. Miller, of Sioux City, Iowa.

Plans for further educational projects are well under way in Columbus, Ohio; Tifton, Georgia; Jamestown, New York; Harrisburg, Pittsburgh and Lancaster, Pennsylvania; and Salt Lake City, Utah.

Association Calendar

FEBRUARY 26-28, 1951—Mid-Year Meeting of the House of Delegates, Edgewater Beach Hotel, Chicago, Illinois

FEBRUARY 27, 1951—Meeting of State Delegates To Nominate Officers and Members of the Board of Governors

APRIL 19, 1951—Deadline for receipt in the Chicago Headquarters of Petitions for Nomination of State Delegates (For publication in the April issue of the JOURNAL, petitions must be received by March 5)

SEPTEMBER 17-21, 1951—74th Annual Meeting of the American Bar Association, New York, New York

OUR YOUNGER LAWYERS

Richard H. Keatinge, Secretary and Editor-in-Charge, Los Angeles, California

■ The postwar renaissance of bar activity, particularly among the younger lawyers, the creation of new state junior bar sections, the amendment to the By-Laws of the Junior Bar Conference placing its activities on a calendar-year basis and the increasing role played by the Conference in the activities of the American Bar Association are some of the many factors that have led to an introspective re-examination of the functional operations and the organizational structure of the Junior Bar Conference to assure that the best advantage is being derived from its inherent capabilities.

The Committee* appointed to make this study has filed its report and with it certain recommendations for change, most of which, with minor exceptions, have been adopted by the Council.

There will be printed shortly for the guidance of the membership an operating manual which will inform it of the responsibilities of various offices, and by whom and within what time various appointments are to be made.

Within one month after the Annual Meeting, each committee chairman will submit to the National Chairman a brief statement of the intended scope of the work of his committee during the ensuing year. After approval by the National Chairman, and within two months after the date of the Annual Meeting, copies of this statement will be sent by each committee chairman to the members of his committee, to each officer, member of the Council and state chairman. By the same time, the National Chairman shall have prepared a brief statement of the intended over-all national program, indicating those activities or committees that are to receive special attention or consideration.

In the matter of appointments and program, continuity will further be assured by the requirement that the annual report of all reporting personnel, except the national officers, shall contain the name of a recommended successor for the ensuing year. Additionally, the reports of committee chairmen must contain recommendations with reference (a) to whether or not the committee should be continued in the ensuing year; (b) to the extent of the proposed membership of the committee for the ensuing year and (c) to a brief statement of what, in the opinion of the retiring committee, should be the activity of that committee in the ensuing year.

With the addition of this type of information, the Council will best be able to discharge its duty to assure that the Conference has sufficient and appropriate committees, that it does not needlessly retain committees that have served their purposes and that the committees that it does have are properly constituted and directing their efforts toward the attainment of the most desirable objectives.

With reference to reports, the manual places over-all responsibility upon the Vice Chairman and specifies the persons who shall receive copies of various reports. The specification of recipients is designed to provide state chairmen and members of the Council with adequate information to enable them to determine whether or not the Conference program is being properly advanced within their respective jurisdictions.

The provisions discussed above should have the desired effect of (1) advising each participating member of the names of the other participating members, (2) advising those responsible for the success of the program of what is hoped to be accomplished, (3) advising those people of what is or is not being accomplished in their respective jurisdictions, and (4) maintaining continuity of program with an annual review by the Council to assure that the program is best adapted to the needs of the American Bar Association, the Conference and its constituent member associations.

One of the most difficult and recurring problems of a state chairman is to determine how best to employ the limited time of a limited number of people who are interested in furthering the general objectives of bar associations. Too often the choice is between employing his forces toward the attainment of a local objective of great significance and the objectives of a national committee which are meaningless and unnecessary in his state. An organization without objectives is fruitless and futile. Equally barren are objectives without interest to the community where the organization functions. Fundamentally the basic ideals of bar associations are identical. They are far better attained by a concentration of effort upon the curing of a critical local deficiency than they are by a dissipation of energy in pursuit of an overextended national program imposed from above and without local significance. The committee's observation is a recognition of this fact.

The manual makes no specific recommendation with respect to the manner in which this realignment of emphasis should be accomplished. It seeks the recognition of a principle from which recognition will result, in practice, a proper perspective of the relationship between the Conference and its member organizations.

The most far-reaching change adopted pertains to the selection of the Nominating Committee and the procedure for the election of na-

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*Consisting of Richard H. Bowerman, New Haven, Connecticut, Chairman; T. Julian Skinner, Jr., Jasper, Alabama; Randolph W. Thrower, Atlanta, Georgia; Cameron W. Cecil, Los Angeles, California; Richard H. Keatinge, Los Angeles, California and Robert A. Stuart, Springfield, Illinois.

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Do We Need Legal Aid?

■ At the recent American Bar meeting in Washington, I stated that there would be no need of free legal aid societies supported by charity or municipal funds, were not the lawyers so greedy that they would not represent a poor person without pay. I suggested that law firms assign one lawyer to handle meritorious claims for persons unable to hire a lawyer. The prestige of a lawyer from such a firm as the John W. Davis firm in New York, or the Dean Acheson firm in Washington, appearing for a poor person in court, would promote more good will for the legal profession than any public relations committee. Such people do not want charity. They want to be represented by a good law firm, well known. Most of the daily papers carried my speech, and I have gotten many letters endorsing it. The Bar is at a low ebb. It could be socialized, or even disappear entirely. Boards, Bureaus, Commissions and arbitrators could easily supplant lawyers. The future of the profession is most uncertain. The lawyer through greed or laziness has missed many opportunities. They may never come again. It was the duty of the lawyer alone to promote the administration of justice. He refused to do so, so the courts took it over. It was the sole duty of the lawyers to make the rules of procedure as they alone use them, but when they refused to do so, the courts made them. The courts have also suffered. A governor of a great state recently called members of the judiciary "senile" and "drunks" and "incompetent". It is getting late. Is it too late?

JOHN T. BARKER
Department of Justice
Washington, D.C.

Wants To Abandon Legal-Size Paper

■ I wish lawyers would quit using legal size paper.

It louses up the filing system of any business. Most files in most business offices are built to handle 8½ x 11 paper—which is what business invariably uses. The glaring exceptions are the legal documents.

It would be totally uneconomic for business to retool its entire filing system to accommodate this lawyers' idiosyncrasy; valuable inches in *all* filing space would be wasted.

If business existed for the benefit of lawyers, it would be reasonable to ask business to adapt itself and get in line. But if it's the other way around, why should not the lawyers cut out the legal-size nonsense and adopt the standard 8½ x 11 sheets, just like everybody else.

Why not undertake the heroic job of initiating this change?

FRANK E. PELLEGRIN
New York, New York

Natural Law and Sterilization

■ In the April, 1950, JOURNAL appeared an interesting and well-written article by Harold R. McKinnon of the San Francisco Bar. The title was "The Secret of Mr. Justice Holmes". The article was a sharp attack upon Holmes' philosophy. Mr. McKinnon is an advocate of the natural law philosophy. I was interested in the fact that he failed to mention an opinion by Mr. Justice Holmes in *Buck* v. *Bell*, 274 U.S. 200. The entire Court, except Mr. Justice Butler, agreed with the opinion. The decision in this case sustained the validity of the Virginia sterilization law.

I wrote to Mr. McKinnon and asked him whether he thought that the decision was contrary to natural law. He courteously replied that he so thought. Then I wrote to him and asked whether he thought that the Virginia sterilization law was inconsistent with the Fourteenth Amendment. Again he courteously replied and stated that he thought that the Virginia statute should have been held unconstitutional "because it violated an inherent, natural right, and therefore infringed due process of law. . . ."

I can only offer this comment, that a legal philosophy that would prevent the states in this Union and the United States from enacting and enforcing a sterilization law does not appeal to me.

KENNETH C. SEARS
University of Chicago
Chicago, Illinois

Martha Washington's Last Will and Testament

■ George Washington died at Mt. Vernon, Virginia, December 14, 1799, and his wife thereafter died and her will, dated September 2, 1800, was admitted to probate and record before the County Court of Fairfax County, in the Commonwealth of Virginia on June 21, 1802.

During the War between the States, Fairfax County was within the lines of the Union Army and subject to its control. During this period the original will of Martha Washington disappeared, and, after the war was terminated, the Commonwealth of Virginia made diligent efforts to

(Continued on page 1049)

Proceedings of the Assembly:

1950 Annual Meeting

■ The first joint session of the American and Canadian Bar Associations was convened at Washington, D.C., in Constitution Hall on the morning of Monday, September 18, 1950 A.D.

Again the two nations were fighting in a common cause; to repel the aggressor who had invaded the Republic of Korea. They were doing so in compliance with the resolution of United Nations to guarantee the inviolability of peace-loving nations against attack, which is the essential prerequisite to the establishment of international justice according to international law.

In this solemn atmosphere, to which all present were acutely sensitive, the President of the American Bar Association asked The Right Reverend Angus Dun to invoke Divine guidance for the deliberations which were immediately to be entered into and for the decisions that must be taken.

The members in the great gathering rose and stood with bowed heads while Bishop Dun spoke these words of prayer:

> O God, at Whose hand the weak take no wrong nor the mighty escape just judgment, we humbly beseech Thee to bless the courts of justice and the magistrates in all this land and in the Dominion of Canada, that by their true and faithful execution of justice and equity to all men equally, Thy righteousness may be set forward among us. Make the peoples of our lands reverent in the use of freedom, just in the exercise of power, generous in the protection of weakness. Enable us to guard for the least among us the freedoms we covet for ourselves. Grant us grace fearlessly to contend against evil and to make no peace with oppression. Hold us in obedience to Thy holy will that in the day of Thy judgment we may be able to stand in the light of Thy countenance, and may our deepest trust be in Thee, the Lord of nations and the King of Kings. *Amen.*

This atmosphere of reverence and resolution, invoked by the Bishop's prayer, was felt throughout the meetings of the two Associations.

This complete summary of the proceedings of the Assembly, published in accordance with our custom, and the summary of the proceedings of the House of Delegates which appeared in the November issue of the *Journal*, are factual accounts of the meetings, but a bare statement of the facts fails to convey the true feeling of the mood of this 73d Annual Meeting. The real significance is contained in Bishop Dun's prayer and in the addresses of the distinguished men who spoke during the week, several of which appear in our November and December issues.

FIRST SESSION

■ The Assembly of the American Bar Association convened with the members of the Canadian Bar Association at 10:20 A.M. September 18, 1950, at Constitution Hall in the City of Washington for the first session of the joint Annual Meeting of the Canadian and American Bar Associations. Harold J. Gallagher, of New York, President of the American Bar Association, was in the chair.

After the invocation, pronounced by the Right Reverend Angus Dun, Bishop of the Washington Diocese of the Protestant Episcopal Church, John Russell Young, President of the Board of Commissioners of the District of Columbia, delivered an address of welcome to the members of the two Associations. D. Park Jamieson, M.B.E., K.C., Vice President for the Province of Ontario, responded on behalf of the Canadian Bar Association, and Walter Chandler, of Tennessee, responded for the American Bar Association.

The lawyers of the two countries then heard greetings from the Bar of England, read by Sir Godfrey Russell Vick, Chairman of the Bar Council of England. Joseph D. Stecher, of Ohio, Secretary of the American Bar Association, read a message of greeting from the Japan Federation of Bar Associations.

The Presidents of the two Associations delivered their Annual Addresses as the first order of business for the joint session. The address of Arthur N. Carter, K.C., of New Brunswick, of the Canadian Bar Association, was published in the November issue of the JOURNAL beginning at page 895 and that of Mr. Gallagher, of the American Bar Association, appears in the October issue beginning at page 813.

Before delivering his address, Mr. Gallagher turned the chair over to Guy A. Thompson, of Missouri, a former President of the American Bar Association, who presided during the remainder of the session.

Louis E. Wyman, of New Hampshire, offered the following memorial to the late Frederick H. Stinchfield,

of Minnesota, a former president of the American Bar Association:

> Frederick Harold Stinchfield was born in Danforth, Maine, May 9, 1879. He graduated from Bates College in 1901. He then spent a year teaching in the Philippines. He graduated with honors from Harvard Law School in 1905. He began practice in New York with the firm of Guthrie, Cravath and Henderson. After four years in New York he went to Minneapolis with the firm of Wilson, Mercer, Swan, Ware and Holsinger. In 1918 the independent firm of Jamison, Stinchfield and Mackall was established which became Stinchfield, Mackall, Crounse and Moorse in 1928 and so continued until his death. He died suddenly on January 15, 1950, in La Jolla, California, while on vacation.
>
> He was commissioned a Major in the Judge Advocate's Department in the First World War. He was a charter member of the American Law Institute, a member of the National Economy League, and a member of the American Historical Society. He was President of the Hennepin County Bar Association in 1923, of the Minnesota State Bar Association in 1927 and of the American Bar Association in 1936. He was the first President of this Association under the reorganization through which we have since been carrying on. His administration was marked by the controversy which arose over President Franklin Roosevelt's "Court Packing" plan. Promptly upon the announcement of that plan, Hal Stinchfield issued the call to arms, to support the integrity of our judicial system. With the unanimous approval of the Board of Governors, he brought to this contest the full strength of his combative disposition supporting his faith in basic constitutional principles. We all know the result which his cooperation helped to attain.
>
> Hal Stinchfield was Hal Stinchfield, an individual, with a competent, analytical mind, who believed in the right and duty of free expression of opinions and who never hesitated to state his own. His fellow members of his Bar certify to his great ability as a trial lawyer. Such a reputation was due not only to his legal learning but to his great respect for the law as an institution. It was also due to his outstanding capacity to understand people and to appreciate the working of human relationships and conduct. He had a sort of "sixth" sense of knowing what the other fellow was thinking about.
>
> He knew no fear in his advocacy—he could take sharp issue with opponent or with the Court when he thought occasion required. He was thoroughly individualistic in his thought and action, and in his belief that the citizen possessed personal rights that should be free of governmental interference. He was not one to seek praise for himself, and while he greatly appreciated the honor bestowed on him by this Association, he probably would not want me to say that he deserved the honor.
>
> He would appreciate brevity more than mere flowers of speech. With his passing the Bar has lost a stalwart defender of constitutional government, an opponent of federal centralization, a sound lawyer who had faith in our nation, and I—we all at the Bar—have lost a friend.

Chairman Thompson then called for the presentation of resolutions that members of the Association wished to offer. Fifteen resolutions were presented. The gist of these resolutions and the action taken upon them are reported below.

American Bar Association Endowment Meets, Chooses Directors

The Assembly then resolved itself into a meeting of the American Bar Association Endowment, and the President of the Endowment, Jacob M. Lashly, of Missouri, took the chair.

Mr. Lashly reminded the members of the Association that the Endowment includes all members, by virtue of their membership in the Association. The Endowment is an Illinois corporation empowered to receive "gifts, bequests and devises to be used for the advancement of jurisprudence and the promotion of the administration of justice and uniformity in judicial decision throughout the United States, exclusively through education and scientific research . . . ".

Mr. Lashly reported that the resources of the Endowment, after nine years of existence, now amount to $394,034.59, of which $375,629.22 has been received from the estate of William Nelson Cromwell, of New York, whose will left a portion of the residue of his estate to the American Bar Association.

Mr. Lashly then called for nominations to fill two vacancies on the Endowment's Board of Directors caused by the expiration of the terms of two members of the board. Frank E. Holman, of Washington, nominated William Logan Martin, of Alabama, and Carl B. Rix, of Wisconsin, both to succeed themselves. On motion of Frederic M. Miller, of Iowa, the members of the Endowment voted to instruct the Secretary to cast a unanimous ballot for Mr. Martin and Mr. Rix.

Howard L. Barkdull, of Ohio, then moved a change in the By-Laws of the Endowment. This change rewrote Article VI so that it would read as follows:

> The books of accounts shall be audited annually by certified public accountants and shall at all reasonable times be open to inspection by any member of the Corporation.

Mr. Barkdull said that this change was desirable because the books of the Endowment are kept separate from the books of the Association, and the audit of them is made independently of the audit of the books of the Association. The old form of Article VI required the books of the Endowment to be audited annually "in connection with the annual audit of the books and accounts of the American Bar Association".

The members of the Endowment, more than fifty being present as required, then voted to adopt the change.

This concluded the business of the Endowment, and the members of the Association present resumed the meeting of the Assembly. Chairman Thompson presided.

Secretary Stecher called the attention of the Assembly to a vacancy in one of the posts of Assembly Delegate, caused by the resignation of Robert G. Storey, of Texas. Elwin A. Andrus, of Wisconsin, nominated Jo Bailey Brown, of Pennsylvania, and he was unanimously elected to fill the unexpired term ending in 1951.

The next item of business was the nomination of candidates for five posts as Assembly Delegate for three-year terms beginning at the adjournment of the 1950 Annual Meeting. The following were nominated: Arnold C. Otto, of Wisconsin; Charles Ruzicka, of Maryland; Douglas Hud-

son, of Kansas; Robert T. Barton, Jr., of Virginia; Frank W. Grinnell, of Massachusetts; Hatton W. Sumners, of Texas; John M. Slaton, of Georgia; James D. Fellers, of Oklahoma; W. J. Jameson, of Montana; Albert R. Teare, of Ohio; Kurt F. Pantzer, of Indiana; Delger Trowbridge, of California; and Julius Applebaum, of New York.

The Assembly then voted to recess at 12:45 P.M.

SECOND SESSION

■ This session was called to order at 8:30 P.M. Monday, September 18, at Constitution Hall with President Harold J. Gallagher presiding. The members of the two Associations heard addresses by Louis A. Johnson, Secretary of Defense of the United States, and Leonard W. Brockington, C.M.G., K.C., of Canada. Mr. Brockington's address was published in the November issue of the JOURNAL, beginning at page 904.

THIRD SESSION

■ The third session of the Assembly convened at 2:10 P.M. at Lisner Auditorium, Washington, D. C., on Wednesday, September 20, 1950, with President Harold J. Gallagher presiding.

F. M. Sercombe, of Oregon, Chairman of the Committee on Award of Merit of the Section of Bar Activities, presented the 1950 Awards of Merit to state and local bar associations for outstanding work done during the year. The awards were as follows:

Large State Bar Associations—The State Bar of California
Small State Bar Associations—No award
Large Local Bar Associations—Toledo (Ohio) Bar Association
Honorable Mention—Columbus (Ohio) Bar Association
Small Local Bar Association—Baton Rouge (Louisiana) Association

Walter Chandler, of Tennessee, Chairman of the Committee on Resolutions then gave the report of that committee.

The first resolution, he said, was introduced by Edward W. Allen, of Washington, and proposed that the Association reaffirm its opposition to compulsory health insurance. Mr. Chandler said that the Board of Governors, the House of Delegates and the Assembly had already placed the Association on record as opposed to such insurance, and that his committee decided that no new resolution on the subject was necessary. On his motion, the Assembly voted to approve the committee's decision to stand by the resolutions previously adopted.

The next resolution, numbered "3", was proposed by Robert K. Bell, of New Jersey. The resolution declared it to be the primary responsibility of the legal profession to assume the leadership in establishing legal aid facilities throughout the country and that such legal aid facilities should be established and maintained without governmental control or influence over their operations. The full text of this resolution appears in the November issue of the JOURNAL at page 971. On Mr. Chandler's motion, the Assembly voted to adopt the resolution. Allen B. Endicott, Jr., of New Jersey, speaking in favor of the resolution before it was adopted, told briefly of the legal aid work being carried on in New Jersey and urged the Assembly to approve the resolution.

Resolution No. 5, which was the next reported by Mr. Chandler, introduced by Miss Dorothy Frooks, of New York, would have condemned public officeholders who write articles for pay "thus using their public positions and knowledge of that position for increased income". Mr. Chandler moved that the resolution be not approved by the Assembly because it was beyond the scope of the Association. President Gallagher ruled, as a point of order, that the resolution was not germane to the purposes of the Association.

Mr. Chandler next presented Resolution No. 6, also introduced by Miss Frooks, which would have placed the Association on record as favoring legislation prohibiting private practice of law by lawyers who are earning more than $3,000 annually from employment in a city, state, national or other public agency. Mr. Chandler said that his committee favored referring this matter to the Conference of Bar Association Presidents since the subject was largely local in character and should receive consideration by the local associations. On his motion, the Assembly voted for such referral.

The next resolution was introduced by George Washington Williams, of Maryland, and it called attention to the large number of immigrants admitted under our naturalization laws and the superficial examinations of prospective citizens by many District Courts. The resolution called for a committee of the Association to study the subject to investigate the matter of naturalization proceedings to recommend better ways of preparing aliens for citizenship. Mr. Chandler said that his committee recommended that the matter be referred to the Committee on American Citizenship, and the Assembly voted to do so on his motion.

Mr. Chandler then presented the next resolution which had been submitted by Thomas Todd, of Washington. This resolution called for a study and report by the Committee on Peace and Law Through United Nations on the extent to which changes in the United Nations Charter might tend to preserve peace, prevent aggression and promote world justice. On Mr. Chandler's motion, the Assembly voted to refer the resolution to the Peace and Law Committee as the resolution itself suggested.

The next resolution was introduced by Adrian M. Unger, of New Jersey, and would have declared that the Association believes that applicants for membership shall be considered without reference to race, color or creed. Mr. Chandler's com-

mittee believed that the matter was covered by the Association's Constitution, Article II ("Any person who has been duly admitted to the Bar of any state and is of good moral character shall be eligible to membership in the Association.") Accordingly, he moved that no action be taken. The Assembly voted to adopt his motion.

Mr. Chandler said that the next resolution had been presented by Kenneth C. Royall, of New York, and that it favored a convention with foreign countries to avoid double taxation. Mr. Chandler moved that it be referred to the Section of Taxation. The Assembly voted to adopt this motion.

Mr. Chandler said that Mr. Royall had submitted another resolution relating to the action of the United Nations in Korea, but that his committee felt that it was not within the scope and purposes of the Association.

The next resolution was introduced by Miss Dorothy Frooks, of New York. It placed the Association on record as supporting the "Crusade for Freedom". On Mr. Chandler's motion, this resolution was referred to the Committee on American Citizenship with the suggestion that that committee co-operate in the Crusade.

A resolution submitted by George E. Morton, of Wisconsin, calling for appointment of a committee to review the constitutionality of the Social Security Act was disapproved on Mr. Chandler's motion.

Another resolution submitted by Mr. Morton was referred to the Committee on American Citizenship. This resolution was entitled "What Makes Us Free?" Mr. Chandler described it as "not so much a resolution as it was a treatise on the subject of what makes us free". He said that his committee had felt that the resolution and the accompanying briefs would make a "fine study".

Assembly Approves Non-Communist Affidavits

Mr. Chandler then moved the adoption of a resolution submitted by Albert P. Jones, Robert G. Storey, Gordon Simpson, S. Allen Crowley and Paul Carrington, all of Texas, which called for legislation or rule of court in each state requiring members of the Bar to file non-Communist affidavits. The complete text of this resolution appeared in the November issue of the JOURNAL at page 972. In reply to a question of Orlin A. Weede, of Missouri, Mr. Chandler said that the words "and periodically thereafter" in the resolution, referred to additional affidavits after the filing of the first one and that the committee had not considered what the period should be, leaving that for the decision of the public authorities. The Assembly voted to adopt the resolution.

The Assembly also voted to adopt a resolution submitted by Edward W. Allen, of Washington, authorizing a special committee of the Association to study Communist tactics, strategy and objectives. The text of this resolution is printed in the November issue of the JOURNAL at page 971.

The joint meeting of Canadians and Americans then heard two addresses, one by Stuart S. Garson, K.C., Canadian Minister of Justice, and the other by J. Howard McGrath, Attorney General of the United States.

After these addresses, Mr. Chandler again took the floor to present to the Assembly the last four resolutions that had been referred to his committee.

A resolution introduced by Miss Dorothy Frooks condemning the use of names of deceased lawyers in firm names was referred, on Mr. Chandler's motion, to the Committee on Professional Ethics and Grievances.

The next was a resolution submitted by George Washington Williams, of Maryland. This would have placed the Association on record as favoring an amendment to the Federal Constitution prohibiting the Congress from making any law or treaty that conflicts with a state law pertaining to "education, elections, qualifications for suffrage, civil rights of individuals, racial relations, labor zoning, transfer and ownership of property and other such exclusively local subjects" and providing that "no federal court shall invalidate state laws on these subjects". The resolution would also have provided that the amendment should include a clause stating that "grants in aid from the United States shall be administered exclusively by the states".

Committee Recommends Rejection of Resolution

Mr. Chandler said that his committee felt that this resolution was too broad in scope for consideration at any one meeting of the Association and that it was too broad in scope for the purposes of the Association. He moved that it be not adopted.

Mr. Williams spoke for adoption of his resolution. He read statements by Presidents Woodrow Wilson and Franklin Delano Roosevelt to the general purport that the Congress had no power to legislate on a number of questions, and said that in recent years legislation in these fields had been enacted by the Congress. "We are going very far afield from the original tenets [of the Constitution] as described by our Founding Fathers" he declared. He urged the Assembly to adopt his resolution "at least in principle".

Roy A. Bronson, of California, said that he thought the resolution was so broad and indefinite that the Association could get down to no specific statements of policy. He agreed with the recommendations of the committee, he said.

Mr. Williams moved that his resolution be adopted as a substitute for Mr. Chandler's motion, but President Gallagher ruled that this was out of order.

The Assembly then voted to reject the resolution, 45-4.

A resolution submitted by Max Chopnick, of New York, similar to one introduced by Edward W. Allen, of Washington, already approved by the Assembly (*supra*), calling for a committee to study Communist methods, was referred to the Committee on American Citizenship. Mr. Chandler explained that this was desir-

able because Mr. Chopnick's resolution contained a proposal for a long-range educational program "to bring to the peoples of the world the truth about democracy".

The last resolution was one submitted by Louis Waldman, of New York. It gave the endorsement of the Association to the Internal Security Act (the "Communist Control Bill"), and had already been approved by the House of Delegates. The complete text of this resolution appeared in the November issue of the JOURNAL at page 972. The Assembly voted to adopt the resolution.

At the request of Thomas Todd, of Washington, his resolution relating to a study of the United Nations Charter, previously referred to the Committee on Peace and Law Through United Nations, was also referred to the Section of International Law.

Mr. Williams, of Maryland, asked that his resolution dealing with a constitutional amendment prohibiting federal legislation in certain fields be referred to the Committee on American Citizenship. President Gallagher ruled that his request was out of order since the Assembly had already voted to reject the resolution.

Roy E. Willy, of South Dakota, Chairman of the Committee on Rules and Calendar of the House of Delegates, reported the actions of the House on the proposed amendments to the Constitution and By-Laws of the Association. The Assembly voted to concur in the actions of the House in each case. The texts and purposes of these amendments are reported in detail in the November issue of the JOURNAL, beginning at page 952.

The session then recessed at 4:45 P.M.

FOURTH SESSION

■ The fourth joint session was called to order by Arthur N. Carter, K.C., President of the Canadian Bar Association. He turned the gavel over to John W. Davis, of New York, Past President of the American Bar Association, who served as chairman.

Mr. Davis presented the Certificate of Award and the $2,500 prize check to the winner of the 1950 Ross Essay Contest, Norman C. Melvin, Jr., of Maryland. Mr. Melvin gave a brief summary of his essay, "The Use of Injunctions in Labor Disputes". The entire essay is published in this issue beginning at page 1007.

James P. Economos, of Illinois, Assistant Secretary of the Association, announced the results of the balloting for Assembly Delegates. Hatton W. Sumners, of Texas; Charles Ruzicka, of Maryland; James D. Fellers, of Oklahoma; W. J. Jameson, of Montana; and Robert T. Barton, Jr., of Virginia, were elected for three-year terms. Mr. Economos announced also that the subject of the 1951 Ross Essay Contest would be "The First Ten Amendments: The Character, the Status and the Relative Importance and Dignity of the Rights Guaranteed Thereby".

Senator Wayne L. Morse, of Oregon, Chairman of the Traffic and Magistrate Courts Committee, presented the Awards of Merit to cities showing the greatest improvement in their traffic courts. He said that 601 cities participated in the third annual Traffic Court Contest conducted by the Section of Criminal Law. There have been many improvements in practices and procedures in urban traffic courts since the contest was begun, he said, and the progress during the last year indicates that the contest is fulfilling the objective set out in its authorization. He announced the sixteen awards for 1950. The list of winning cities appears in the November issue of the JOURNAL at page 945.

Mr. Morse said that the committee again commended Washington, D.C.; Milwaukee, Wisconsin; Kansas City, Missouri; Portland, Oregon; and Akron, Ohio, for continuing the high standards that enabled them to win awards in previous years.

He said that the committee had awarded, with the concurrence of the Council of the Section of Judicial Administration, the first state award to the State of New Jersey. This award, authorized at the 1949 Annual Meeting, is for state improvement in traffic court practices.

The joint session then heard addresses by Senator John Wallace deBeck Farris, K.C., D.C.L., of Canada, a past president of the Canadian Bar Association and by Me André Toulouse, Batonnier of the Paris Bar.

M. André Taschereau, of Quebec, then presented Me Toulouse with Honorary Membership in the Canadian Bar Association.

The meeting ended at 3:50 P.M.

FIFTH SESSION

■ The joint Annual Dinner of the two Associations comprised the fifth session of the Assembly. The dinner was held Thursday, September 21 at 7:30 P.M. in the National Guard Armory, with the Presidents of the American and Canadian Bar Associations as joint chairmen. The members and guests present drank toasts to the President of the United States, to His Majesty, The King, and to the heads of the other sovereign states represented at the meeting.

President Gallagher presented the American Bar Association's Gold Medal, the highest honor that the Association can confer, to Judge Orie L. Phillips, of Colorado. The citation read by Mr. Gallagher appears at page 1014.

President Gallagher then presented an Honorary Membership in the American Bar Association to President Carter of the Canadian Bar and to Me André Toulouse, Batonnier of the Paris Bar.

The meeting was then addressed by Judge Bruce Bromley, of New York.

President Carter took the chair and E. Gordon Gowling, K.C., Dominion Vice President of the Canadian Bar Association and its President for 1950-51, presented an Honorary Membership in the Canadian Bar Association to Judge Bromley, and President Carter presented an Honorary Membership to Mr. Gallagher.

Lord Justice Birkett then gave his address which appeared in the November issue of the JOURNAL at page 891.

Cody Fowler, of Florida, the new President of the American Bar Association, spoke briefly, and President Gallagher thanked the members of the Association for their co-operation during the year.

SIXTH SESSION

■ The last session of the Assembly convened at 10:45 A.M. in the Presidential Room of the Hotel Statler on Friday, September 22, with President Gallagher in the chair.

On motion of John Kirkland Clark, of New York, the Assembly voted to extend warm expressions of thanks to the Bar Association of the District of Columbia for the hospitality shown the American Bar Association during the meeting.

The new officers and members of the Board of Governors were introduced, and Mr. Gallagher turned the gavel of the President over to his successor, Cody Fowler, of Florida.

The meeting adjourned *sine die* at 11:05 A.M.

Judge Phillips Receives 1950 Award

(Continued from page 1014)

the Bar in the United States for conspicuous service to American jurisprudence, those who looked into the future could have contemplated no worthier recipient than you who have given to jurisprudence the common touch. With deep satisfaction, therefore, the Board of Governors of the American Bar Association confers upon you the American Bar Association Medal and at the same time presents to you a scroll upon which the resolutions which have just been read to you are embossed and engrossed."

In responding, Judge Phillips said in part:

"Though I take deep personal satisfaction in that honor, I feel that it is bestowed as a recognition of the work of the team—the work of judges and lawyers unselfishly striving together to make the law so living and dynamic as to meet the needs of a modern and complex society, and yet so constant in its principles and their application as to enable men to know the rules that condition their acts, and the legal consequences of their contractual and other obligations, and to provide a judicial system that will effectuate equal and impartial justice, with certainty and expedition in controversies between men, and between the citizen and his government, and preserve ordered liberty under law.

"In that spirit and in that representative capacity, I accept the honor and express my gratitude and sincere appreciation."

Views of Our Readers

(Continued from page 1043)

discover the whereabouts of this valuable document, but without success.

Upon the death of J. Pierpont Morgan, Sr., a list of rare documents, purportedly owned by this great financier, was published and, among them, the original will of Martha Washington was named. Immediately the Commonwealth of Virginia made demand upon the son of J. Pierpont Morgan, Sr., for the delivery of this will to it, for return to the Courthouse of Fairfax County, but he refused to make delivery on the ground that he was the lawful owner.

Thereupon the General Assembly of Virginia authorized the commencement of a suit in the Supreme Court of the United States, for the recovery of the last will and testament of Martha Washington and the employment of John S. Barbour, as a lawyer, to assist the Attorney General of Virginia, the Honorable John Garland Pollard, to prosecute said suit to a successful conclusion.

The complaint, by leave of the United States Supreme Court, was filed on or about March 1, 1915, and a subpoena was issued to the defendant, John Pierpont Morgan, Jr., the son of John Pierpont Morgan, Sr., requiring him to answer the complaint on a specified date. The defendant employed distinguished lawyers in New York City to contest the right of the complainant, the Commonwealth of Virginia, to recover this rare document. Before the return day of the subpoena, the defendant, through his attorneys endeavored to terminate the litigation by agreeing to deposit the will with the Library of Congress or some other federal depository to be mutually agreed upon, for safe keeping, but the complainant refused all such overtures and insisted upon its rights as the owner of this historic document.

Not being able to secure a compromise, the defendant, on an appointed day, through his attorney, delivered possession of the original will of Martha Washington, in the U. S. Supreme Court room, to the attorneys for the complainant, the Commonwealth of Virginia, and it was promptly restored to the safe keeping of the Clerk at Fairfax Court House in the State of Virginia.

The jurisdiction for this suit was based upon Section 2 of Article III of the Federal Constitution and my friend and classmate, John S. Barbour, who gave me the information about this suit, expressed regret that the defendant avoided the issue of ownership by delivering the will, without a trial on the merits, because he had concluded that the complainant was entitled to a jury trial, and he anticipated the unique pleasure of participating in a jury trial before that august tribunal, the Supreme Court of the United States.

NATHAN NEWBY

Los Angeles, California

Law in the Service State
(Continued from page 981)

the result of their own fault or improvidence, and to that end that liability to repair all loss or injury will be cast by law on someone better able to bear it. This suggests at once a variant of the Marxian axiom: To everyone according to his wants; from everyone according to his means. From each according to his abilities, to each according to his needs.

Extreme extensions of the services rendered by the state have a significant effect upon the morale of the people. It is not so much that administrative imposing of the policies of bureau officials upon business and industry threatens the inventive initiative and adventurous enterprise that have been characteristic of Americans from the beginning. What is more serious is that the attempts to relieve pressure groups of liabilities which are imposed upon the rest of us confuses the whole relation of law and morals. The most notable and far-reaching relaxation of morals, which has been going on all over the world along with the rise of the service state, is the breakdown of the feeling of duty to perform promises. In the past nothing had seemed so fundamental in economics, in morals, and on the whole in law, as credit. In an advanced economic order credit is a principal form of wealth. The promises of the Government to redeem its bills in lawful money to the bearer on demand circulate as money. The promises of states and counties and cities in the form of bonds to pay interest and in due time principal, and the bonds and notes of public utilities and of industrial and business corporations are the assets of charities and foundations and trust companies, and the notes of businessmen, of traders and shopkeepers are the assets of banks. But all of these forms of wealth get their value from experience which justifies a presupposition that men will do what they promise. Credit, this presupposition that promises will be kept, is the logical basis of the whole economic order.

Nor is the role of credit less important if we look deeper. In civilized society men must be able to assume that those with whom they deal in the general intercourse of society will act in good faith and hence will make good reasonable expectations which their promises or other conduct reasonably create. Thus the social order itself rests upon stability and predictability of conduct, of which the keeping of promises is a large item.

Binding Force of Promises Is Basis of Our Principles

From the Greek philosophers who thought on social control and ethics and recognized stability and predictability of conduct as fundamental, the morally binding force of a promise has been taken for a starting point. This appears indeed in our everyday language. We say that the upright man is trustworthy and reliable. We may rely on his constancy in business, political, and domestic relations. On the other hand, we say that the unrighteous man is untrustworthy, unreliable, unprincipled. We cannot trust to or rely on his constancy or conformity to principle in business or political or family relations. Hence in systems of political and legal philosophy the starting point has been to refer institutions to a basis in promises. An eighteenth-century publicist proved, as he conceived from Scripture, that God held himself bound by a promise and added that the Devil and the king were bound by promises also.

A well-known legal author, writing in 1853, put it thus: "The law of contracts . . . may be looked upon as the basis of human society. All social life presumes it and rests upon it; for out of contracts, express or implied, declared or understood, grow all rights, all duties, all obligations, and all law. Almost the whole procedure of modern life implies, or, rather, is the continual performance of contracts." Moreover, the political theory of the founders of our constitutional democratic polity rested the Government itself upon credit. They declared that it derived its just powers from the consent of the governed. Its basis was found in a social compact or social contract by which each of us was bound to his fellow men to uphold the order of society and adhere to its institutions and laws.

While morals have, from as far back as when men began to think and write about moral obligation, insisted on good faith in the performance of promises, the law long left enforcement to social control through morality and religion and refused to interpose unless they were put in some required form or were part of some recognized transaction. But the Church, as early as the fourth century, prescribed that promises were to be kept and this canon was handed down in the body of law administered by the ecclesiastical courts in the Middle Ages. The law of Continental Europe took this over from the church law and enforces promises without regard to form when meant as legal transactions. In the English-speaking world, for historical reasons the law has not gone quite so far. In the orthodox doctrine of Anglo-American common law a promise, if not formal, must be part of a bargain. It must be exchanged for an act or for another promise in order to be enforceable in the courts.

But no less than fifteen exceptions have grown up in America, and the Law Revision Committee in England has recommended abolishing the requirement of consideration and making promises intended to create obligations enforceable as such without more.

Obligation of Promises Is Breaking Down

Today, however, at the very time when the law has come substantially to the position of morals—that promises as such are to be kept—there is coming to be a new cleavage between law and morals in an increasing breakdown of the strict moral doctrine as to the obligation of a promise.

A radically different view as to the obligation of a promise begins with the orthodox Marxian socialism in

the latter part of the last century. It starts from Marx's doctrine that law will disappear with the abolition of private property, since law is held to result from the division of society into classes and to be nothing more than a device for keeping an exploited class in subjection. The juristic and economic adviser to Soviet Russia, down to the purge of 1936, insisted that law had its sole basis in the exigencies of exchange of commodities, or in other words, the demands of business. It made trade possible by adjusting the controversies which arise out of it. When there could be no ownership he held there could be no conflicting interests to be adjusted and so no need of law. This teaching was repudiated when Stalin came into power at the purge in 1936, and attempts have only been made recently to reconcile a legal order in Russia with orthodox Marxian theory. But all contract view of the state is given up. It is not regarded as resting on the consent of the governed but is held to be an organization of compulsion. Also the law of obligations or of contracts in the widest sense of that term, which makes up the bulk of the law in the modern codes as well as in the uncodified law of the English-speaking world, finds no place as such in the Soviet codes.

Continental Europe has had a longer experience of the service state than we have had in English-speaking lands. Hence it is instructive to see how the law of contracts has fared in France. Two phenomena are discussed by French jurists today in connection with contracts. One is what Josserand calls "contractual dirigism", *i.e.* of making contracts for people instead of leaving contracts to be made by the parties for themselves. The other is a humanitarian idea of rendering a service to debtors or promisors by lifting or shifting burdens or losses so as to put them upon those better able to bear them. The two are closely related. When contracts are made for people by the service state they do not feel any strong moral duty to perform them. If the state makes the contract let the state perform it or compensate the disappointed promisee. Hence we read in the French law books of today about "the principle of favor to the debtor" and Ripert speaks ironically of what he calls "the right not to pay debts".

In 1804, Article 1134 of the French Civil Code put emphatically the obligatory force of a contract. "Agreements legally formed take the place of law for those who have made them." Planiol tells us that this doctrine of the obligatory force of a contract had a two-fold basis: "A moral idea, respect for the given word [and we must remember that in the eighteenth century law of nature the moral was held to be legal and the legal declaratory of the moral]; and economic interest, the necessity of credit." But the idea of a contract as a making of law for themselves by the parties fitted in with the idea of promotion of free individual self-assertion as the end of law, which obtained increasingly after the sixteenth century and was characteristic of the maturity of law in the nineteenth century. Comparison of a contract to a law was, indeed, traditional. The Romans called a strict foreclosure clause in a pledge a *lex commissoria*. Ulpian in the Digest spoke of a contract as a law for the parties. Domat repeated this in the seventeenth century. The nineteenth-century metaphysical jurists, to whom freedom of the individual will was the central point in their science of law developed and refined it. Thus a Scotch writer on philosophy of law, writing in 1884 said: ". . . it is impossible in an ultimate analysis to draw a distinction between a contract and an act of Parliament." Again he says: "In like manner the whole operation of preparing contracts, agreements, settlements, conveyances, and such deeds, is purely legislative. The conveyancer who prepares a contract of copartnery, or articles of association of a company, is framing a code for a greater or smaller number of persons. A marriage settlement or a will is equivalent to a private act of Parliament regulating the succession of a particular person or persons. . . . All such deeds make the law for the persons involved." In other words, the free wills of the parties had made the law for them. The courts could no more change this than any other part of the law. Even the legislator was bound to respect it as to the contracts of the past. That idea was put in the Constitution of the United States. But this idea has been disappearing all over the world. In France it is gone entirely. This was covered up for a time by what Austin would have called spurious interpretation. By assuming that the will of the parties had not been fully expressed, courts could discover in contracts terms which were not there and were not in the minds of the parties and could modify the terms which they found there. French legislation went further and gave the judges power to suspend or rescind contracts and change their conditions. The parties no longer made law for themselves by free contract. Partly, French lawyers tell us, there was a moral idea here. Contracts might be improvident or changes in the economic situation might affect the value of the promised performance or of the given or promised equivalent. This is akin to an idea we may see at work in the law of legal liability everywhere. It is a humanitarian idea of lifting or shifting burdens and losses so as to put them upon those better able to bear them. Belief in the obligatory force of contracts and respect for the given word are going, if not actually gone, in the law of today.

We are told by French jurists that it means a shift to a state-directed economy. Planiol puts it thus: "If the state undertakes to direct the economy itself it cannot admit the maintenance of contract relations contrary to those it envisages. Contracts of long duration become impossible where in all cases they are exposed to revision of their clauses. Legal reglementation is substituted for contractual reglementation. The

contract is no more than the submission of the parties to an obligatory regime."

Anglo-American Law Is Moving Toward "Contractual *Dirigism*"

Things have not gone so far in the English-speaking world. But they are moving in the same direction. As to "contractual dirigism" we have been getting our share. Standard contracts, statutory obligatory clauses in contracts, statutory and administrative prescribing of contract provisions and control over making, performing and enforcing of contracts are becoming everyday matters.

What French writers speak of as the moral or humanitarian aspect of the disappearance of free contract has been going on gradually in Anglo-American law and has been gaining for a generation. There is a notable tendency in recent writing everywhere to insist, not, as did the nineteenth century that the debtor keep faith in all cases, even though it ruin him and his family, but that the creditor must take a risk also, either along with or in some cases instead of the debtor. Limitations on the power of a creditor to exact satisfaction have a long history. In the case of certain debtors as against certain creditors, the Roman law in the classical period gave the benefit or privilege of not being held for the entire amount but only for so much as they could pay for the time being. Later it was held that this meant what they could pay without depriving themselves of the means of subsistence. This benefit was allowed where because of some relation between them it was held impious for one to strip the other of all his property and leave him a pauper. This doctrine was rejected by French law in the nineteenth century. But recent codes and legislation in Continental Europe have provided a number of restrictions upon the power of the creditor to exact satisfaction, which have been likened to the Roman privilege, but were later referred to an idea of social justice and are now generally referred to a general public service of relieving debtors as a function of the state in order to promote the general welfare by releasing men from the burden of poverty. In the United States, homestead and exemption laws began to be enacted more than one hundred years ago, and have been greatly extended in the present century, chiefly to protect the family and dependents of the debtor, but partly to secure the social interest in the individual life. There is, however, a changed spirit behind these extensions; a spirit of a claim upon society to relieve one of the burdens he freely assumed, based upon an assumption that thus relieving him is a service to the whole community which the state has been set up to perform. A debtor is by no means always the underdog which high humanitarian thinking postulates. The creditor may be guardian of orphans or trustee for a widow and the debtor a wealthy speculator who has taken on too much and seeks to shake off an inconvenient load. "Favor to debtors" as the French put their policy of the time, may be a great hardship on creditors who in particular cases make a more meritorious appeal.

How far the humanitarian doctrine of favor to debtors is taking us is illustrated by the theory of contract now taught by professors in some of our leading law schools. They put forth what they call the prediction theory of contract. It has not been applied to promissory notes. So far as I know, no one as yet has urged as the real text of a promissory note something like this: "Ninety days after date, for value received, I predict that I shall be able and willing to pay John Doe or order five hundred dollars." But the bonds and notes of municipalities, public utilities, and industrial corporations under our legislation as to reorganization come to something very like this.

Legislation Impairing Contracts Is Now Upheld

This mode of thinking is not confined to professorial or juristic theory. Legislation impairing or doing away with the practical legal means of enforcing promises is now upheld on the basis of a doctrine that power of the legislature to relieve promisors of liability is implied in the sovereignty of the state. Such relief is one of the services the state is set up to render. But how does that comport with a limitation of state legislation prescribed in our Federal Constitution?

After resumption of grants and revocation of franchises at every turn of political fortune in seventeenth-century England, and of colonial legislation and state legislation in the depression after the Revolution, interfering with the enforcement of contracts and revoking charters, we put in our Federal Constitution a prohibition of state legislation impairing the obligation of contracts. But that provision of the Constitution has now, for the largest part at least, become a mere preachment; and the spirit that has led to substitution of a preachment for an enforceable constitutional provision has been affecting regard for the upholding of promises on every side. There is no longer a strong feeling of moral duty to perform. When to lack of this feeling is added impairment of the legal duty as well, it undermines a main pillar of the economic order.

In the same direction we may note recent extensions of bankruptcy relief so as to make escape from debts as easy as incurring them, if not easier. For a generation legislation has increasingly limited the power of the creditor to collect, has created more and larger exemptions and has added much to the once narrowly limited number who may escape through bankruptcy. This, too, has been rested avowedly on the powers of the service state. Statutes authorizing municipalities to "reorganize" their debts are upheld, as courts tell us, by "extending the police power into economic welfare". That the quest of certainty, uniformity, and stability in the nineteenth century carried what might be called a hard-boiled attitude too far is clear enough. We ought, however, to have learned from the history of law that that hard-boiled attitude was itself a reaction

from extreme individualized justice in an earlier stage of legal development, and should have been able to avoid an extreme of counterreaction in our zeal to be more humane today. In an extreme of humanitarian thinking we lose sight of the social interest in the security of transactions and the threat to the economic order which is involved.

Bankrupt No Longer Feels Moral Obligation To Pay Debts

If letting people of full age and sound mind contract freely and holding them rigidly to the contracts they freely made was carried to an extreme in the last century, a system of restricting free contract and relaxing the obligation of contract may be carried quite as far to the other extreme in reaction, and the spirit of the time seems to be pushing everywhere to that other extreme. The man of high moral sense, who after bankruptcy in time voluntarily paid off his barred debts, used to be pointed out as an example of the just and upright man to whom his neighbors looked up. Today, I fear, he would be set down a fool.

Now that the Government builds great housing units with every convenience, will not the next generation say why should the Government require payment of rent? Why not as a further service furnish free comfortable housing up to at least the middle standard of the community for all who cannot provide such housing for themselves and at the same time enjoy the same advantages of leisure and entertainment and good living of the middle standard of prosperity? If men need not pay debts why should they pay rent? The promises of the service state invite that question. Does not an ideal of absolute equality of economic condition and advantages of life call for this? This is the next step in argument. Thus the service state may shade into communism.

But the movement to relieve promisors is not confined to legislation. The courts have been doing their share in building up a body of doctrine as to frustration. A law teacher now tells us that there is "a real need for a field of human intercourse freed from legal restraint, for a field where men may without liability withdraw assurances they have once given". Certainly the one-time general proposition that courts cannot make contracts over for the parties, that freedom of contract implies the possibility of contracting foolishly, is giving way to a power of the service state to act as guardian for persons of age, sound mind, and discretion and relieve them by judicial action from their contracts, or make their contracts over for them or make their promises easier for them. We are now told that even where a contract contains provisions as to the consequences of particular possible frustration the courts may recognize other frustrations and apply other consequences to them. Often the words finally written in a contract after a long negotiation are the result of hard-fought compromises. They are not ideal provisions from either side but are what each is willing to concede in order to reach agreement. After some frustrating event has happened and a party who has suffered damage from nonperformance is suing for it, to say that he intended and would have consented to insert a condition which the court conjures up to relieve the promisor is to make a new contract under a fiction of interpretation. This sort of interpretation, which has great vogue in the service state, is said by a judge of one of our courts to be a process of distillation. The meaning is distilled from the words. It might be suggested that distilling is often illicit and the product moonshine.

So much in everyday life depends upon reliance on promises that an everyday dependence will lose its effectiveness if promises are to be performed only when it suits the promisor's convenience. A promise which imposes no risk on the promisor belongs to the prediction theory. It is not a promise. A promisee expects the promise to be performed even if it hurts. Why relieve only the promisor? Forty years ago sociologists were saying that social control through law having put down force in the relations of men with each other must now take the next step and put down cunning. But all depends on what is meant by cunning. Are we to say that superior knowledge, diligence, ability to foresee, and judgment as to persons and things are to be allowed to have no influence in transactions? Undoubtedly men desire to be equal in all respects. But they also desire to be free. They desire to be allowed to use the qualities they have been born with. Carrying out satisfaction of the desire to be equal to its fullest development would reduce all activity to the lowest possible attainment. No one would be allowed to exert himself beyond the capacity of the least efficient. The answer is that men's desire to be equal and their desire to be free must be kept in balance. Either carried to the extreme negates the other.

What is required in government, as in all else that men do, is balance. He that believeth, says Isaiah, shall not make haste. Ultimate perfection of mankind can no more be achieved through government than through the other universal agencies of improving mankind men have believed in in the past. Additional services by the state where they can be performed by the state without waste of what we have learned how to do well by other institutions and without reducing the individual man to passive obedience or to parasitism, is a reasonable program which need not carry us to the omnicompetent state.

Our Younger Lawyers

(Continued from page 1042)

tional officers. By June 15 of each year nominating petitions must be filed with the National Chairman by those who seek a national office. The Nominating Committee may not nominate to any national office anyone for whom a petition has not been filed, although a person who has petitioned for one office may be nominated for another. If no petitions have been filed for a particular office, the Nominating Committee may nominate from the membership at large.

The July issue of *The Young Lawyer* will publish the names of those on whose behalf petitions have been filed. In this manner, the names of candidates will be known before the Nominating Committee is selected.

Heretofore the National Chairman has had sole discretion with respect to the appointment of the members of the Nominating Committee. In the future, members of the council, in conjunction with their respective state chairman, will determine the member of the committee from that circuit.

In this manner, members of the association, speaking through their state chairmen, will have a voice in the selection of the Nominating Committee at a time when the candidates have made known their intentions. The practical effect will undoubtedly be the appointment of a committee whose members have been instructed by their respective states and circuits as to the men who are preferred for each office by those states. In this manner, a democratic system of selection has been adopted which gives to the membership, speaking through state chairmen, a true vote.

Although this method of electing officers and appointing a Nominating Committee is in contravention of the By-Laws, no changes in the latter have been proposed until such time as the new system has been tested in the forge of experience.

It remains, of course, to be seen whether the organizational changes and changes in the elective process will prove to be feasible. Irrespective of the outcome, introspection of this type bespeaks a proper recognition by the Council of its obligation to the membership of striving to derive the maximum benefit from the Conference.

Bar Examinations

(Continued from page 990)

(1) No uniformity exists in the *quality* of bar examinations given in the different examining and admitting jurisdictions.

(2) There is very little uniformity to be found in the *quality* of bar examinations given *within the same examining and admitting jurisdiction.*

(3) No uniformity whatsoever appears in the standard of grading answers in the different examining and admitting jurisdictions.

(4) As traditionally and currently set, the typical bar examination is not an accurate test of the training that has been and is being offered by the better law schools of the country.

It must be admitted that each of these adverse criticisms is serious and that there is much evidence upon which to base each of them. Together, they are so serious that one cannot reasonably look forward to their eradication so long as bar examinations are formulated and the answers read and graded by each of forty-nine examining jurisdictions. Merely to state this is almost if not quite to prove the correctness of the statement.

But what can be done about it?

Other Professions Have Shown How To Solve Problems

The medical men and the certified public accountants have pointed the way to the lawyers. Both professions set, and administer, national examinations the results of which have met with general acceptance, in the medical world at least. On principle there seems to be no essential difference between a nationally set and nationally administered bar examination and a nationally set and nationally administered medical examination.

The National Board of Medical Examiners was founded in 1915. "Its chief purpose was to establish in this country a qualifying examination of such high character that successful candidates could be safely admitted to the practice of medicine by all state boards of medical licensure without further examination. It was also thought that such a test would provide a known group from which physicians could be safely chosen for positions demanding an exceptionally thorough medical training."[12]

The certificate of the National Board of Medical Examiners is accepted as an adequate qualification for a medical license by the licensing authorities "of all of the forty-eight states, except Florida, Indiana, Montana, and Wisconsin; by the Territories of Alaska, Hawaii, and Puerto Rico; and by the Isthmian Canal Zone. At present, Louisiana exempts diplomates of the National Board from the state examination if they have been licensed in some other state with which Louisiana reciprocates."[13]

In a letter dated April 29, 1949, to the writer of this paper, the administrative secretary of the American Institute of Accountants stated, *inter alia*:

> The American Institute of Accountants, the national professional organization of certified public accountants, has, since 1917, offered to state boards of accountancy, a uniform written examination twice a year, usually in May and November.

From the same source it has been learned the uniform examination has been adopted by the examining authorities of all states and territories of the United States and the District of Columbia, with two exceptions, Pennsylvania and Wisconsin. No

12. Circular of Information, National Board of Medical Examiners of the United States, Bulletin No. 3, revised September 1, 1946.
13. Ibid.

state board is committed in advance to adopt the uniform examination. If, for any reason, a local board feels that the uniform examination does not adequately meet the local need, the local authority may set a different examination; and it may give additional examinations or add questions to the uniform examination.

The uniform examination for accountants is prepared and administered by the Institute's board of examiners. At the request of the board of examiners, in recent years a committee has been appointed of professors in well-known universities to review the board's procedures, present raw examination material, and suggest ways of making the uniform certified public accountant examination fully serve its purpose.

Thus, it is apparent that the accountants are nationally co-operating with the schools.

The apparent desirability of a nationally set and nationally administered bar examination has been much discussed[14] but nothing has yet been accomplished to implement such a project. The principle is strongly favored and supported, but it would be expensive to implement any plan. The probable cost in the first instance seems to be the main, if not the only obstacle in the way of trying to correct and cure the many ills of the bar examination systems to which attention has been directed in this paper.

One would suppose that the members of the American Bar can do what the members of the medical profession and the certified public accountants have done if the members of the Bar should, when informed, feel that a nationally formulated, set, and administered bar examination would more speedily than anything else remedy the defects which are so glaring in the existing local bar examinations.

National Bar Examinations Would Be Self-Supporting

A national organization set up for the purpose could in all probability be self-supporting at the end of three or four years and, in the process of becoming so, it could set and administer bar examinations in the admitting jurisdictions much more cheaply for the individual candidate for admission than a local examination can now be administered. Once the national examination idea gained acceptance, a charge could be made of from $30 to $50 per candidate. Even at that low rate, a self-supporting national organization would speedily emerge and, at the same time, the admitting jurisdictions would be able to save expense. The local examining boards could eventually devote themselves to policy matters in the main.

As has already been indicated, the services of a national organization would probably have to be offered free to the examining authorities in the several admitting jurisdictions in order to demonstrate to them that the examination questions and briefs so offered are so much better than any that could be produced by most admitting authorities that they will be warranted in accepting them. But such services should not be so offered unless the board, or other proper authority, to which they are offered will agree to conduct its examination in accordance with the requirements of the national organization. Among such requirements there should probably be a requirement that the examination be administered pursuant to the advice and guidance, at every step, of the Educational Testing Service, of Princeton, New Jersey, for example, which has had many years of successful experience in conducting examinations throughout the continental United States.

In its early stages the experiment could be limited to the setting of examinations in the fields covered by the core of eleven to thirteen subjects which, as stated above, Professor Stevens has found "*90%* or more of the states through the agencies responsible for selecting bar examination subjects feel are essential". These eleven subjects are, it may be repeated, contracts, criminal law, real property, evidence, pleading, torts, constitutional law, corporations, equity, agency, and negotiable instruments, and, adds Professor Stevens, "probably personal property and wills" which 85 percent and 81 per cent, respectively, of the admitting jurisdictions seem to feel are essential.

It might be objected that to limit the scope of the nationally administered examination would encourage the law schools to limit the scope of their instruction accordingly. Nobody should wish such a result to occur: but, if there is substance to the objection, the possible or probable unwanted result could be prevented by resorting to an expedient which Professor Stevens has suggested to the writer of this paper: The nationally administered examination could be withheld from any jurisdiction which would not exact from each applicant a certificate in proper form stating that, in addition to the subjects enumerated above, he had studied a given number of additional subjects out of a carefully prepared list of elective subjects. Of course, if the experimental period of the suggested national examination should show positive evidence of probable success for the plan, the scope of the nationally administered examination could, and probably would be, enlarged as the judgment of the governing body of the national group might, from time to time, determine with and subject to the advice of the representatives of the law teaching profession and the local boards of bar examiners.

It might be objected also that to read and properly grade an average of, say 14,000 to 15,000 examination papers annually would be too great a job to be undertaken by a national organization. But, it would seem, the problem presented here is a problem of organization and administration. Large numbers, 1,000 and more, of examination papers are successfully handled annually by the examining authorities in California and New York. Moreover, if the national examination project ever reaches the stage of experiment, it is reasonably certain that for several of the experi-

14. *Ibid.*

mental years the number of examination papers to be read and graded would be quite few as compared with the number which might be offered if the national plan should ever meet with complete acceptance in all admitting jurisdictions. Meanwhile, during the early years of experimentation under the plan, the ultimate problem presented by the adequate handling of as many as 14,000 or 15,000 examination papers annually could be worked out. No objection which can be met by adequate organization and efficient administration should be permitted to condemn the project at the outset.

Passing Examination Would Not Admit Student to Bar Automatically

It is not suggested in this paper that the successful passing of the national examination should, alone, entitle a candidate to admission in any state. Precisely stated, the suggestion is that a national examination should be tried in the hope that the merit of the questions set by the national group, within the scope of the group of core subjects which have been mentioned, will be so great as compared with the questions and procedures now used and followed in most of the admitting jurisdictions, that the project will prove its worth.

Nor is it suggested that no questions other than those formulated by the national group should be given at any examination. On the contrary, the project assumes that some admitting jurisdictions would, and perhaps should, give questions on local law. Such questions should, however, be submitted to the national organization for inclusion in the national examination.

It should be noted, too, that although the national organization should read and grade all nationally administered examinations, such grades as are given by the national organization need not necessarily be accepted as final by any local board. Each local board could, if it wished to do so, either add to or subtract from the national grades for the purpose of determining admissibility in a local jurisdiction.

Brief mention should be made of the possible objection that some, or even many, admitting jurisdictions might not have the legal power to adopt the essentials of a national bar examination. In a few instances there may be merit in this objection; but a glance at the statutes and rules of the several jurisdictions fails to disclose that it could be urged by more than a very few for the simple reason that in the great majority of jurisdictions the examining authorities are vested with sufficiently broad powers to enable them to make use of a nationally drawn and corrected bar examination. To go into this question thoroughly would lengthen this paper unnecessarily. It suffices to say now that an objection to a national examination does not seem to be serious if it is based on asserted want of power in a local board.

Anyone who has had experience on the examining side of the process of admitting to practice law recognizes the truth of the statement, said to have been made 130 years ago, that "Examinations are formidable even to the best prepared, for the greatest fool may ask more than the wisest man can answer." It requires no imagination to see that an organization adequately staffed and managed could, with the aid of the Association of American Law Schools, the Council of the Section of Legal Education and Admissions to the Bar and the National Conference of Bar Examiners, very quickly bring about a degree of co-operation between the practicing Bar and the bar examiners on the one hand and the law schools on the other that has never before been seen in this country. The benefit to the public, to the legal profession and to the law schools would be incalculable.

Chief Difficulty Is Financial

The difficulty in the way of making the experiment seems to be largely financial in nature. The American Bar Association's Section of Legal Education and Admissions to the Bar, the Association of American Law Schools and the National Conference of Bar Examiners have all formally expressed their desire that the national project here discussed be put in operation at the earliest possible date. There is unanimity on the principle, but money is lacking.

In conclusion, the question may be seriously asked, isn't it now time to try to find funds with which to enable the legal profession to experiment with a nationally administered bar examination? The cost of an executive director and his staff would not be very great in comparison with the importance of the job they would have to do. $60,000 to $75,000 annually should cover these items. In addition, the cost of questions and briefs, at the rate of $300 per question and brief would amount to from $8,000 to $10,000 per year, assuming at least two questions on each of thirteen subjects. The cost of reading and grading examination papers would vary with the number read and graded. In California each reader is paid $75 as a fee for preparing himself to read and grade, plus thirty-five cents for each answer read and graded. In addition, there would be rent and miscellaneous expenses and, perhaps, travel expense for the staff and for the members of the governing body to enable the latter to attend two or three meetings yearly during the first two or three years and probably two meetings yearly thereafter.

An over-all cost of somewhere between $120,000 and $150,000 per year would seem to be indicated. It would appear that the project could be launched with some hope of real success if underwriters can be found who will underwrite the actual expense, not exceeding $150,000 a year, for a period of three years.

Blessings of Taxation

(Continued from page 1002)

and grave responsibility in times like these.

Tax law is necessarily technical, and we are people who are peculiarly qualified to deal with those technicalities. We are rather quick to move to action when there is some portion of the law which affects some particular group of taxpayers. But we ought to be equally quick to act in the public interest. Just plain John Q. Taxpayer needs our help, too. If we do not exert our talents to guard against discrimination and special privilege, there will be few others who can help him.

It is quite clear that the Tax Section has made much progress in this direction. Indeed, one of the greatest satisfactions I get out of our meetings is hearing my good friend Bill Sutherland making arguments in favor of the Government. But Bill can't do it alone. He needs our help. Let us strive even more than we have to maintain our professional independence and to contribute to the building of a tax system that will really spread the burdens of our times with fairness and equality.

It has been a great source of satisfaction to me over the years to see the growing strength and maturity of the Tax Section. I think we are all greatly indebted to Cecil Kilpatrick for his fine leadership during the past two years. A lot of fine and important work has been done. But the Tax Section has a great public responsibility which it is not yet fully meeting. In times when taxes must be high, it is most important that they should be fair and nondiscriminatory, that they should not be full of loopholes and special privileges. Yet right now, in the midst of a real shooting war, we are apparently about to enact a new tax law which contains some gross, almost crude, inequities. Where has the voice of the Tax Section been on these matters? What about family partnerships and stock options? Is there really any decent justification for the handouts which are reportedly about to be given to a special few taxpayers on these matters? What about the gross inequities of the law in favor of the oil and gas interests? Is there any justification for adding to that discrimination now by the so-called "in oil" provision of the present bill? Where was the voice of the Tax Section on that matter?

Should Federal Tax Field Be More Highly Organized?

This leads me to a thought which is not strictly relevant to the question of trends and developments in the tax law, but which I venture as one worth some consideration from the Section.

We have long had the tradition of the general practitioner, and I hope we shall have that tradition for a long time to come. But more and more some lawyers are in fact tending to become specialists. The existence and growth of this Section is evidence of that fact. I am wondering if the time has not come when we should begin to take a further step towards the recognition that we are in fact working in a specialized field.

The medical profession is much more highly organized than are the lawyers in this country. There is the American Medical Association, to which nearly every doctor belongs, instead of just a small proportion as in the case of the American Bar Association. But there are also in the medical field many specialized organizations. These include the American College of Surgeons, the American College of Ophthalmology, the American College of Internal Medicine, and many others. Each of these organizations sets standards in its particular field, and each prescribes fairly elaborate and difficult examinations for persons who aspire to enter that particular specialty. None of these organizations has any technical or legal standing. Each merely sets professional standards in its own area. A person can be a general practitioner without belonging to any of them. He can even practice one of the specialties without belonging to the organization of that specialty. But if the man does belong to the specialized society the public has reason to believe that he is really qualified to act as a specialist.

Is there not room for a development of this sort in the tax field? I do not propose that we take definite action now, but merely that we think about it. There are many problems that would have to be solved, and these should be carefully considered and worked out before anything is done about the matter. What to do about existing practitioners, for example? How long a delay after admission to the Bar before a man would be eligible to take the specialized examinations? What sort of practical experience must he have had? What kind of examinations should be given? Who should give them? How would the plan be financed? These are only some of the questions which would have to be worked out. But I think we have an opportunity in the tax field to establish a genuine specialty organization which would be hard to do in other branches of the law. In corporations, in trusts,

even in insurance, there would be widespread variations in the law according to the state in which the man expected to practice. But federal taxation has one thing in common with medicine. At least throughout the United States it is uniform. We are dealing with a single body of law. The federal tax practitioner who is qualified to practice in Los Angeles is qualified to practice in Bangor, with a relatively small amount of work on questions of local law.

So, I suggest for your consideration the American College of Federal Taxation. It is only an idea. But it might possibly develop into a trend in the tax field and so I have thought it appropriate to present it here.

We have long had death and taxes as the two standards of inevitability. But there are those who believe that death is the preferable of the two. "At least," as one man said, "there's one advantage about death; it doesn't get worse every time Congress meets."

(Continued from page 1010)

depression. The Act incorporated all the demands, substantive and procedural, made by the unions. It outlawed the "yellow-dog" contract, provided that federal courts were without jurisdiction to issue injunctions in any case involving or growing out of a labor dispute, defined "labor dispute" as existing whether or not the disputants stand in the proximate relation of employer and employee, restricted the *ex parte* activities of the courts, provided jury trial in contempt cases arising from injunctive orders, and affirmatively declared employees' right to collective bargaining to be the public policy of the United States in labor disputes.

The apparent attempt of the law to free unions from provisions of the antitrust laws was affirmed for all practical purposes by the Supreme Court in the *Hutcheson* case.[27] The Court had previously stated in *New Negro Alliance* v. *Sanitary Grocery Company*[28] that the legislative history of the Norris Act demonstrates that it was the purpose of the measure to obviate results of the judicial construction of the Clayton Act.

The law was interpreted broadly to provide that courts have no authority to inquire into activities of unions, so long as there is a "labor dispute", that picketing in the absence of a strike is legal, and further that the secondary boycott may not be enjoined.

The Act did not restrict the courts in areas outside of equity, but as injunctions at the time were the only effective means of curbing unions, passage of the law was a great victory for labor.

Norris-La Guardia Act Fixes Public Policy

The "public policy" clause of the Act demonstrated the changed public attitude toward the unions and their functions and presaged the sweeping labor reforms of the New Deal period. Had he lived, Samuel Gompers, with more justification, could have acclaimed the Norris Act labor's Magna Charta, for here not only had Congress removed the judicial stumbling blocks, but it had paved a broad avenue of public policy for labor's march forward.

The Norris-LaGuardia Act proclaimed it to be the policy of the United States "to protect [the individual organized worker's] freedom of labor, and thereby to obtain acceptable terms and conditions of employment . . . that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers" in his concerted activities.

The unions, however, were not satisfied with their gains. Enterprising employers, deprived of their main weapons, had invented new ones. They struck at union organization by dismissing workers for union activities and by refusing to bargain. The unions demanded and got further affirmative support from Congress in the Wagner Act of 1935.

The Wagner Act was postulated on the principle that employee organizations, by their very nature, are relatively unequal in bargaining power with management. The conclusion from this premise was that Congress, to promote peace in labor-management relations, should limit the power of management and strengthen the force of labor to bring about equality of bargaining. This the Act sought to do by designating as "unfair labor practices" certain employer activity, such as interference with, coercion or restraint of employees in the exercise of their rights of self-organization; interfering with labor organization; discrimination in hire or tenure against union employees, and refusing to bargain.

Fewer laws have been attacked with greater ferocity than was the Wagner Act. It was a measure, the opposition said, that conferred liberal privileges upon the unions and exacted few obligations and responsibilities. Particularly objectionable to many was the underlying assumption that unions could do no evil, and hence were immune to regulation.[29]

The Wagner Act produced the effect its sponsors had calculated, and the unions grew tremendously in numbers and power. Under its beneficent provisions, however, the pendulum finally swung so far that in 1947 Congress passed the Taft-Hartley amendment.

Taft-Hartley Takes Some Privileges from Unions

The Taft-Hartley Act extended the rights of employers and restricted their liabilities. Conversely, it took

27. *United States* v. *Hutcheson*, 312 U. S. 219, 85 L. ed. 788 (1941).

28. 303 U. S. 552, 82 L. ed. 1012 (1938).

29. The double standard prevailing under the Wagner Act as originally written is brought home vividly by a collection of cases appearing in 2 Teller, *Labor Disputes & Collective Bargaining*, §§285, 291, 219 (1940). Employees were granted protection under the Act even though they were guilty of assault, riot, grinding sparks in the eyes of management personnel, and other similar acts.

away some of the privileges given to the unions by the Wagner Act and restricted some of their activities.

Union leaders, as was expected, writhed under the new restrictions. They accused Congress of placing its stamp of approval on "slave labor",[30] of reviving government by injunction and of undermining labor peace by inciting old hatreds.

The labor injunction, in fact, was revived and restored to a new condition of respect after fourteen years of oblivion. But argument that the Taft-Hartley Act renews "government by injunction" belies a knowledge of the traditional concept of that phrase.

Taft-Hartley Injunction Is Different from Old Injunction

The labor injunction given new life by the 80th Congress is not the labor injunction of the pre-New Deal era.

In the first place, it is an instrument of the Government to enforce its own legislation. Private parties are not permitted to procure injunctions under unfair-labor-practice provisions of the Act. Only the National Labor Relations Board, acting through its general counsel, is empowered to seek injunctions against acts constituting unfair labor practices. More important still, the law, by labeling as "unfair" certain acts of unions and management alike, was aimed at safeguarding a peaceful relationship between workers and owners, and not at protecting the peculiar rights of either group. Likewise, rigid procedure is set up for the issuance of an injunction under the eighty day "cooling off" provisions of the Act in disputes that threaten the national welfare.

The Act requires the Board's General Counsel to demand relief in disputes arising under Section 8 (b) (4), which makes it an unfair labor practice for a union (1) to compel an employer or self-employed person to join a union or an employer's association; (2) to engage in a secondary strike or boycott, or (3) to strike against or boycott an employer whose employees have designated formally another union as their collective bargaining unit. The petition for an injunction by the General Counsel in all other cases of unfair labor practice is discretionary with the General Counsel.

The only other provision for use of injunctive measures in the Taft-Hartley Act is in the so-called crisis labor situations, where the public health, safety and welfare are affected.

The procedure provided for in the Act in such situations was illustrated in the coal dispute of this year, when the President declared a national emergency to exist, appointed a fact-finding board, and then acting through the Attorney General obtained an injunction to compel the union to call off the strike for an eighty-day "cooling-off" period. Though conditions never reached that point, under the provisions of the Taft-Hartley amendments, the union would have been free to continue with the strike after the termination of the eighty-day period.

The United States Government retains the right to seize plants, although as was indicated in the recent controversy, the President, as a matter of policy, probably would not resort to such measures without specific congressional authority. The Supreme Court held in 1947[31] that, under Government seizure, the restrictions on the issuance of injunctions

30. That argument must be re-examined in light of the coal dispute of this year when the issuance of an injunction under the emergency provisions of the Taft-Hartley Act failed to force the miners back to the mines. Cf. an article by Schwartz in 263 *Annals of the American Academy of Political and Social Science*, May, 1949, pages 73-84, wherein the author cites the plight of Russian workers who may not leave their jobs until released by their employers.

31. *United States* v. *United Mine Workers of America*, 330 U. S. 258, 91 L. ed. 884 (1947).

found in Section 20 of the Clayton Act and in the Norris-LaGuardia Act do not apply to the United States Government as an employer or to relations between the Government and its employees.

Labor Objects to Taft-Hartley's Closed Shop, Secondary Boycott Clauses

Labor has objected strongly to provisions of the Taft-Hartley amendment outlawing the closed shop and the secondary boycott. It has complained of hardships caused by the restrictions on union shops and the check-off system of union dues payments. It contends that the mandatory injunctions against unions only, in the instances cited above, and the non-Communist affidavits required of union officials, but not management officials, are discriminatory.

On the other hand, it should be emphasized that it is Congress, and not the courts this time, that has established the law of the land. The court injunction is used as the best method of enforcing this law. The Statute has eliminated the objectionable *ex parte* procedure of the courts in the old era, has defined labor law in exact terms, precluding legislation by judicial fiat. The right to a hearing, under accepted rules of evidence, and to a trial by jury in contempt proceedings, are guaranteed the unions.

The District Court decision in which Judge Keech found the Mine Workers Union not guilty of contempt in the latest coal strike,[32] although not finally adjudicated as regards the civil contempt issue, is plausible rebuttal against the argument that the Taft-Hartley Act is slave-labor legislation. Although Judge Keech gives lip service to the rule that a union is responsible for the mass action of its members, it is difficult to square his decision with that of Judge Goldsborough in a previous case involving the United Mine Workers[33] wherein he declared:

> The Court thinks the principle is this: that as long as a union is functioning as a union it must be held responsible for the mass action of its members. It is perfectly obvious not only in objective reasoning but because of experience that men don't act collectively without leadership. 350,000 to 450,000 men would all get the same idea at once, independently The idea of suggesting that from of leadership, and walk out of the mines, is of course simply ridiculous.

Under Judge Keech's decision the question has been left open as to what would have been the next step if a contract had not been entered into and the miners had continued to stay out of the pits even though the Government seized the mines.

This much is certain: The national emergency provisions of the Taft-Hartley amendment do not, as some of its sponsors hoped it would, provide easy settlement of all national emergencies arising from labor disputes. Injunctions, in the final analysis, as the miners say, will not mine coal. But no one expects the Government to stand by helplessly while coal goes unmined and a nation suffers.

What of the future? How may labor-management peace best be assured?

Some governments have been successful in enforcing peace in the field of industrial relations, but only at the expense of the liberty of both the individual workingman and of management.

Any future laws must be postulated upon the right of workers to bargain collectively, to organize and to make use of the powers inherent in combination. Otherwise free competition will be unable to survive. But it is also true that our great unions must be made amenable to the interests of the public in general.

Union leaders are no different from industrial leaders and too much unfettered power in the hands of either is liable to abuse.

If Judge Keech is sustained on appeal, this country may be faced, under its present laws, with a situation in which unions are beyond the reach of any effective regulatory power.

The absence of testimony before Judge Keech tending to show the wink, the nod or the mutually understood code, only serves to force the major issue into bold relief.

If concerted action by 370,000 men belonging to a single union is not to be looked upon as a responsibility of that union, the labor injunction as a remedial measure will have lost its efficacy in labor-management relations.

If, however, the doctrine of *respondeat superior* applies to labor unions under the circumstances suggested in the opinion of Judge Goldsborough, the Taft-Hartley Act may yet prove an instrument for labor peace.

It is submitted that the essence of Judge Goldsborough's reasoning must be adopted by the Supreme Court when it has occasion to consider the question. Otherwise more stringent laws, which must ultimately redound to the detriment of labor, will evolve. And such alternatives as equal accountability for employer and union alike to the antitrust laws, or provisions for compulsory arbitration, or for government ownership will be written into the law of the land.

It must be remembered that the area of state control is still wide.[34] Should a union not be responsible for the acts of its members acting in concert, and should a period of labor unrest arise as a result of such a doctrine, the states may be expected to provide further restrictive legislation.

As has been suggested, the problem is not a simple one. Its solution will be found neither in logic nor in *stare decisis,* but any solution can only be postulated on the responsibility of a union for the mass action of its members. Otherwise some new approach which may make union leaders long for the days of Taft-Hartley may result.

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32. *United States* v. *United Mine Workers of America,* U. S. Dist. Ct., D. C., Civil Action No. 683-50 (Decided March 2, 1950).

33. *United States* v. *United Mine Workers of America,* 77 Fed. Supp. 563 (1948), (aff'd: 177 F. (2d) 29; *cert. den:* 94 L. ed. 71).

34. In *International Union* v. *Wisconsin Employment Relations Board,* 336 U. S. 245, 93 L. ed. 510 (1949), the Court called attention to the fact that Congress has designedly left open an area of state control, and the intention of Congress to exclude the state from exercising their police power must be clearly manifested.

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